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IN THE

Supreme Court of the United States

October Term, 1962

No. 359

CARMINE PANICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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No.

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PETITION FOR CERTIORARI

Petitioner, Carmine Panico, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case (*sub nom. United States* v. *Bentvena, et al.*) on June 13, 1963.

Opinion Below

The opinion of the Court of Appeals, printed in the Appendix to this petition, is not yet reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered June 13, 1963 (appendix hereto, *infra*, p. 88a). By order of July 3, 1963, the Honorable Mr. Justice Potter Stewart extended the time within which petitioner Carmine Panico may file a petition for certiorari in this Court to and including August 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Was the petitioner denied a fair trial of the distinct issue of his own guilt or innocence by reason of disruptive and prejudicial occurrences at the trial which were generated by the intrinsic vices of the "mass-conspiracy" trial method?

2. Was petitioner denied a fair trial by reason of the overall circumstances at the trial arising from the abnormal conduct of his brother Salvatore Panico and from the Trial Court's refusal to sever Salvatore?

3. Do the extraordinary circumstances of this case render the case appropriate for certiorari as an avenue for consideration by this Court of the overall degradation of the standards of fair trial that has come about in recent decades in Federal criminal prosecutions through the combined degrading effects of the conspiracy-indictment device, the rule of admissibility of uncorroborated accomplice testimony, and the dilution of the rules of reasonable doubt and presumption of innocence? (Raised pursuant to Rule 52(b), F. R. Cr. P.)

4. Should the method of jurdicially administering the rule of reasonable doubt in federal criminal prosecutions be expressly re-enunciated by this Court along the lines of the concurring opinion of Circuit Judge Jerome Frank in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2 1956); and was petitioner denied a fair trial in that the jury which convicted him was not instructed in accordance with Judge Frank's concept of administering the rule of reasonable doubt? (Raised pursuant to Rule 52(b), F. R. Cr. P.).

5. Was there sufficient evidence of petitioner's guilt for submission to the jury under the rule of reasonable doubt as properly administered, construed and applied? Was his

guilt proved in accordance with such rule? And was his conviction in accordance with such rule?

6. Was petitioner denied a fair trial, and was his constitutional right to be represented by counsel of his own choice, denied, by reason of rulings and remarks of the Trial Court in connection with the circumstances of his representation by counsel during the entire course of the trial?

7. Was petitioner also denied his right to adequate and effective counsel by reason of the Trial Court's imposition upon him, against his will, of an assigned attorney (Mr. Todaro) whom the Court had also assigned to another defendant (Loicano) whose interests conflicted with those of petitioner and his brother co-defendant Salvatore Panico?

8. Was petitioner denied a fair trial by the circumstances arising from the Court's order that he be shackled and gagged in the courtroom?

9. Was petitioner denied a fair trial by being deprived of exculpatory evidence when the Trial Court prohibited petitioner's brother and co-defendant Salvatore Panico from taking the stand to testify in his own behalf?

10. Was petitioner denied a fair trial by the Court's instruction to the jury that the witness Smith was, in effect, an accomplice as a matter of law?

11. Was petitioner denied a fair trial by the Court's instruction to the jury that the "he" referred to in a crucial alleged conversation with the accomplice witness Smith was the petitioner Carmine Panico?

12. Was petitioner denied a fair trial by the instruction to the jury which improperly spot-lighted the fact that petitioner's brother Salvatore Panico did not take the stand, this having occurred for no reason other than that the Trial Court prohibited him from doing so?

13. Petitioner Carmine Panico respectfully adopts, insofar as applicable to his case, the questions presented in the companion petitions for certiorari on behalf of the other defendant-petitioners in this case.

Constitutional and Statutory Provisions Involved

The case involves the Fifth Amendment (due process of law) and the Sixth Amendment (right to counsel) of the United States Constitution. It also involves 21 U.S.C. §§173 and 174; 18 U.S.C. §4244; and Rule 14, F. R. Cr. P. We are advised that these provisions are printed in companion petitions herein.

Statement of the Case

1. Introductory

The judgment of the United States Court of Appeals for the Second Circuit here sought to be reviewed affirmed a final judgment (J368a-371a)* of the United States District Court for the Southern District of New York (Mac-

* "J. a" refers to the printed "Appellants' Joint Appendix" in the court below, nine extra copies of which are on file in this Court, we are informed, *per* the filing herein on behalf of petitioner Mancino, who was a co-defendant in the instant trial. The aforesaid Joint Appendix is not an appendix of trial testimony. The original stenographic minutes of the trial are cited herein by number of page without other designation. There are also on file in this Court, *per* the filing made on behalf of petitioner Salvatore Panico (a brother of the instant petitioner Carmine Panico) in a separate case (No. 633, involving Salvatore's contempt conviction arising from the instant trial), nine extra copies of a printed "Appedix (Supplemental) On Behalf Of Appellants Carmine Panico and Salvatore Panico" which was filed in the Court below, and which does contain portions of the trial testimony relevant to the instant petition. The aforesaid petition of Salvatore Panico (No. 633) is still pending in this Court as an item of the October, 1962 Term which was not disposed of before the Court adjourned for the Summer of 1963.

Mahon, *DJ*), entered July 19, 1962, after a jury trial, convicting the petitioner Carmine Panico (as well as his brother Salvatore Panico*) under the single conspiracy count of an eight-count indictment (J115a) charging substantive offenses and conspiracy in violation of 21 U.S.C. §§173, 174; Severance of counts and defendants reduced the indictment for the instant trial to three counts—two substantive and one conspiracy. The Panico defendants were at all times named only in the conspiracy count of this indictment. A prior trial resulted in a mistrial. In the instant trial petitioner Carmine Panico was sentenced to twelve years (J369a). He is presently incarcerated serving his sentence. His brother Salvatore, who was sentenced to twenty years (J371a), is confined in the Dannemora State Hospital as an adjudicated schizophrenic**.

The indictment and the trial herein were of the "mass conspiracy" type. The indictment charged twenty-nine persons as defendants and seven others as co-conspirators (J115a-124a). Of the twenty-nine named defendants, fourteen were tried in the instant trial, the others having been severed or being unavailable for trial (Appendix hereto *infra*, 3a-4a). One of the fourteen trial defendants (Mari) was acquitted by the trial court; the other thirteen were convicted; three of these thirteen (Bentevna, Monastersky, Struzzieri) were convicted under both substantive and conspiracy counts; the remaining ten defendants, including the two Panico brothers, were convicted under the conspiracy count (*id.* 4a).

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* As will appear *infra*, the case of petitioner Carmine Panico's brother Salvatore has an important bearing on the instant certiorari issues.

** The issues as to Salvatore Panico's mental condition are before this Court in No. 633, and we shall have occasion to refer to this topic *infra* in connection with the issues of the instant petition.

On appeal to the United States Court of Appeals for the Second Circuit the conviction of the instant petitioner's brother, Salvatore Panico, was reversed on the ground that he had been denied a fair trial by the Trial Court's refusal to permit him to take the stand to testify in his own behalf (*id.* 52a-57a). Also reversed were the convictions of the three defendants who had been named and convicted under the substantive counts (Bentvena, Monastersky, Struzzieri) on the ground, principally, that hearsay testimony received under the conspiracy count had prejudiced their chance for a fair trial under the substantive counts (*id.* 66a-86a). The remaining nine convictions, including that of the petitioner Carmine Panico were affirmed (*id.* 88a).

Petitioner Carmine Panico, who took the stand in the instant trial (6318) and denied the accusations against him *in toto* (6331-6334), had a perfectly clean and altogether respectable "record" and life history (he is presently 43 years of age) prior to his troubles in this case (6336—and see the character evidence which he introduced, 7633-7638, 7919). The Government chose not to cross-examine him (6336).

As we shall show, the conviction of petitioner Carmine Panico not only was the product of egregiously prejudicial errors in the conduct of the trial by the Trial Judge, but rests upon "evidence" of such patent insufficiency when tested by both the rules of reasonable doubt and of the prosecutive burden to make out a *prima facie* case, as to make unavoidable the conclusion that he has typically been the victim of the "mass conspiracy" device with its well known tendency to obliterate in jurors' minds the distinct issues as to the factual guilt or innocence of individual defendants—especially in the virtual "witchcraft trial" atmosphere of the mass *narcotics* trial of the present day.

2. The Government's Theory of the "Conspiracy" as a Whole.

The opinion of the Court below (Appendix hereto, *infra*, 4a-5a) summarizes as follows the Government's overall theory of the case:

> "Appellants, together with their co-defendants and co-conspirators, were charged with a conspiracy to import large amounts of narcotic drugs into the United States from Canada, and to dilute and distribute these drugs after their importation. The principal government witness, Edward Lawton Smith, and other government witnesses, described in some detail the workings of the conspiracy and the functional division of labor within the organization. In skeleton outline the conspiracy consisted of a group of Canadians, headed by Guiseppe "Pepe" Cotroni, who handled the exportation of the drugs from Canada. Couriers brought the narcotics across the Canadian-United States border and into the New York metropolitan area. *Members of the conspiracy manned centers in the New York metropolitan area where they received the drugs from the couriers* and diluted and packaged them. Distributors finally disposed of the drugs through various selling outlets. Overall responsibility for the continuing operation rested in its "chief executive", the appellant Carmine Galante." (Italics supplied.)

The alleged place which petitioner Carmine Panico (with his brother Salvatore) occupied in this "conspiratorial" set-up was limited, under the Government's proofs, solely to the sector denoted in the words which we have italicized in the above quotation—it is important to note as to that italicized-portion that there was no proof whatever that the Panico brothers or either of them "diluted and packaged" any drugs, but at most that they "received" the

drugs from the "couriers." This alleged role of the defendant Panico brothers refers to a portion of the Government's theory of the case which was commonly spoken of in the trial and in the appeal below as the "route" or "run" phase of the alleged conspiracy, i.e., a route or series of alleged delivery points or "centers" to which Mancino and Smith used to deliver "wholesale" batches of narcotics allegedly obtained from the Canadian source. The particular "route" "center" allegedly "manned" by the Panico brothers was a bar called the 1717 Club. From the facts to be recited under our next sub-heading this Court will be able to perceive just how tenuously the Panico brothers—especially the instant petitioner Carmine Panico—and their alleged "route" "center" were supposedly linked up with the overall "conspiracy".

3. The Trial Proofs as to Petitioner Carmine Panico (and His Brother Salvatore).

The Trial Court instructed the jury that if they did not believe the testimony of the accomplice witness Edward Lawton Smith they must acquit both of the Panico defendants (J190a-193a). Smith testified that, starting early in 1958, he accompanied the defendant Mancino several times on what he (Smith) eventually found out was a "run" or "route" for the delivery of packages of narcotics in New York City, one of the stops of this alleged "run" being the 1717 Club where, Smith said, he saw Mancino deliver packages. In the first visit to the 1717 Club Smith was not sure that Mancino took a package in, but he saw Salvatore Panico standing in the door (1471). On the next visit to the 1717 Club, about a week later, Smith saw Salvatore Panico, met Carmine Panico and saw Mancino give a package to Salvatore or Carmine, Smith not being sure which one, and then Salvatore and Carmine

went into the back of the place, whence Salvatore and Carmine came back about five minutes later (1483-1485). On April 14, 1958, there was another such "run", during which Smith and Mancino did some quarreling over the fact that Smith felt Mancino was not treating him right (financially or otherwise), and as they arrived in front of the 1717 Club Smith was complaining to Mancino; then the following occurred (1497-1501):

> "Q. When you arrived at the 1717 Club, what happened, if anything? A. I got out of the car. We stood on the sidewalk. I said to Chow [Mancino], 'What are you treating me like a bum boy for?' I said, 'I'm running all over the place with you.' I said, 'You're getting all the benefits and I'm getting peanuts.'
>
> . . . . . .
>
> Q. You may continue, Mr. Smith. A. So Carmine—no, excuse me. Sal came over to us—to Chow and me, standing by my car on the sidewalk. He said, 'What the hell's the matter with you guys? Are you crazy, standing out here arguing when you got stuff here? Get inside. What's the trouble? What's going on? What's the beef?'
>
> I said, 'Well, it's nothing to do with you. It's personal.'
>
> And with this he opened my door and he reached inside, opened the valise and took a package out. We walked across the sidewalk into the door of the club, and Carmine was holding the door open—Carmine Panico was holding the door open. We stepped inside. He said, 'What the hell's going on?'
>
> I said, 'Nothing. It's just a personal argument between Chow and I. I think I'm getting a little bummed around here.'
>
> So he and Sal—
>
> . . . . . .

Q. By 'he', whom do you mean? A. Carmine Panico.

Q. Yes? What happened? A. He, Carmine Panico, said, 'Cool off.' He told the bartender to give us a drink. Carmine Panico and Salvatore Panico then went to the back of the club, into the kitchen. I stepped up to the bar with Chow and in about five minutes or in a few minutes Carmine and Sal Panico came back to the bar.

He said, 'Now, let's get down to what's going on.'

I said, 'Nothing.' I said, 'It's just a little argument between Chow and I.'

He said, 'For Christ's sake do your arguing some other place, some other time, not when you're making a run.' So he says, 'Come on. Look. Let's forget it. We're all friends here. Let's forget it. Let's have a drink.'."

There was another "run" about mid-April 1958, including a stop at the 1717 Club (no details by Smith—1565). In late April 1958 Mancino and Smith went again to the 1717 Club and "We went inside and * * * Mancino, gave a package to Sal [Panico] * * * and he and his brother, Carmine Panico, went in the back and then they came back out again and we left"; (1555). A few days later, Smith said, there was another stop at the 1717 Club where Mancino "gave the package to Sal. He and Carmine, Sal and Carmine, went into the kitchen. We waited until they came back" (1563). Finally, a few days later Mancino and Smith again went to the 1717 Club, Mancino took a package with him, "gave it to Sal. He and Carmine went to the kitchen, went back out, got a drink, stayed for a short period of time, after which we left * * *" (1567-1568).

The foregoing is the sum total of the Government's "conspiracy" proof relating to the Panico brothers. There was no cross examination of Smith's above-described testimony, owing to the unsatisfactory conditions which we note *infra*

as regards the Panicos' representation by counsel at that juncture of the trial. Also, because the Trial Judge *prohibited* him from doing so, Salvatore Panico did not testify on his own behalf despite his repeated and insistent demands to be permitted to do so—as seen, this caused the Court of Appeals to reverse Salvatore's conviction. Petitioner Carmine Panico, as earlier noted, did take the stand (6318 *et seq.*), denying Smith's accusations *in toto* (6331-6334), and the Government did not cross examine him (6336). Also, former narcotic agent Rowan, who was in a position to know quite well the entire evolution of Smith's testimony for this case, testified that Smith had never told him of having any conversation with Carmine Panico at the 1717 Club, and that Smith had said one of the Panicos got a package, Rowan not remembering which one Smith had said this about (7768-7769).

As the Trial Court told the jury (p. 8, *supra*—J190a-193a), the conviction of the Panico brothers had to depend on the uncorroborated testimony of the accomplice witness Smith. Before analyzing the fatal flaws which appear on the face of this sole convicting testimony, we are to note the really extraordinary circumstances of record herein which point to Smith's credibility as having been of the basest order:— Smith had received $5,000 for his testimony before a Canadian Rogatory Commission (2488). He had received a further sum of $5,000 from the United States Government (2500). He had demanded still a further sum of $5,000 from United States authorities before testifying before the grand jury in this case, and had actually received $1,500 of the amount he sought (7703). He was on a Government *per diem* of $350 per month as a "special agent" of the Narcotics Bureau for a lengthy period commencing before the trials of these cases, and lasting throughout both trials (2182). He admitted that one

of his "prime considerations" in testifying was the fact that he was being paid to do so (2185). And he acknowledged that he expected to and would probably receive a further "reward" for his testimony (2187). Admissions were wrung from Smith that he had repeatedly lied under oath. He admitted that he had "told a wilful falsehood" before a grand jury in Chicago in another case (2169), and he acknowledged that he had lied to the United States Immigration Service while under oath before that body (2838, 2841). When asked, "Mr. Smith, do you always tell the truth when you are under oath to tell the truth?", he frankly admitted that "I can't answer it that way. It depends how scared I am. If the fear is great enough, I'll lie" (3149). Indeed, Smith proudly lied on the stand in this very case (1842, 2474, 6583-6584, 7714-7716).

As above intimated, the flaws appearing on the very face of Smith's testimony which purported to inculpate the Panico defendants merit attention. We refer to the testimony (*supra*) that in the course of Smith's and Mancino's alleged "run" to the 1717 Club on April 14, 1958 there was conversation with one or the other of the Panico brothers in which "he" told Smith and Mancino to stop arguing, "some other place, some other time; not when you're making a run" (1493-1501). Literally, this single item in Smith's testimony is the indispensable basis for the conviction of the petitioner Carmine Panico of having been a member of the alleged conspiracy with knowledge of its purpose—i.e., knowledge that what was going on was not merely receipt of narcotics at the 1717 Club from Smith and Mancino, but an extensive conspiratorial "route" or "run". The opinion of the Court below apparently treats this item in Smith's testimony as having the dispositive convicting effect which we above suggested (Appendix hereto, *infra*, 22a). The difficulty with this—from the standpoint of the

claimed justness of the conviction of petitioner Carmine Panico—is that it is absolutely impossible to determine from Smith's testimony whether he was referring to Carmine or to Salvatore Panico when he used the word "he" in this crucial part of his testimony. Despite this, the Trial Court *twice* charged the jury that it was Carmine who said "Do your arguing some other place" etc. (8811, 8814). Trial counsel for the Panico brothers excepted to the Trial Court's patent misinterpretation of Smith's testimony in this regard, and when the Court declined to correct its erroneous instruction, counsel moved for a mistrial in that the Court's erroneous instruction was equivalent to a direction of a verdict against Carmine Panico (8863). The Government's brief in the appeal below (pp. 13, 44, 125) impliedly concedes that Smith's testimony was not positively inculpative of Carmine as distinct from Salvatore Panico. Furthermore, in the first trial Smith testified that on April 14, 1958, he and Mancino were arguing in front of the 1717 Club; that Salvatore Panico came out of the bar and told them to stop quarreling; that Carmine held open the door to the bar; that Salvatore had taken a package from the valise in the car; that Salvatore, Smith and Mancino entered the bar and Carmine told them to cool off and have a drink; that Salvatore and Carmine Panico went to the kitchen in the rear of the bar; and that they came out a few minutes later and Smith and Mancino then left (Tr. 1487-1491, First Trial). At no time did Smith in his testimony at the first trial as to the April 14 incident or as to his other alleged stops at the 1717 Club testify that Carmine or Salvatore Panico ever mentioned the word "run" in their conversations (Tr. 2512 *et seq.*, 2518 *et seq.*, 2524 *et seq.*, First Trial). Both in his testimony at the prior trial (*ibid*), as well as before the grand jury (E J C 6-7) Smith made statements which were irreconcilable with

his having had any such conversation with Carmine as the one above mentioned. Indeed his grand jury testimony (*ibid*) negated his having such a conversation with either brother. His testimony at the first trial (*supra*) pointed instead to Smith's merely having had at most a perfunctory "hello" conversation with Carmine. Smith's grand jury testimony (E J C 6-7) depicted the situation of the alleged inculpation of Carmine even less distinctly. He was not even sure that Salvatore's brother was named Carmine. He had to be milked by the prosecutor to get him to recall that any conversation at all had taken place on the occasion in question. Balked after several attempts to get Smith to testify before the grand jury about this alleged conversation, the prosecutor finally had to ask him directly "Did you have any conversation with the brothers?", to which Smith replied "only with Sol" [meaning Salvatore], and then Smith added this significant bit (we are still describing the grand jury testimony): "But he never—at that time, as I say, I wasn't supposed to know actually what it was, as far as he was concerned." In other words, Smith was here intimating quite plainly that Salvatore (much less Carmine) would not at that juncture have conducted any conversation in Smith's presence which would disclose that a narcotics "run" or "route" was being conducted.

Such, then, was the Government's "*prima facie*" case, such was the "proof of guilt beyond a reasonable doubt", on which the petitioner Carmine Panico, a middle-aged family man of exemplary life background, was convicted in this prosecution and sentenced to twelve years imprisonment. Not one other shred of the Government's proofs in this mass conspiracy trial—not a shred connected with the substantive counts, or with the alleged Canadian operations, or with the portentous quantities of seized narcotics which were flourished before the Jury, or with any

of the alleged "route" defendants, or with any other phase or fragment of the alleged overall conspiracy—purported in the remotest way to connect the petitioner Carmine Panico (or his brother Salvatore) with any of the charges in this indictment.

4. Salvatore Panico's Mental Condition and Behavior During the Trial; the Court and Conduct of the Trial in Relation to the Behavior of Both Panico Brothers and Their Representation by Counsel.

The space limitations of a petition for certiorari in this Court oblige us to treat the important factual items noted in the above heading in the following manner:

In connection with the petition for certiorari heretofore filed by the instant petitioner's brother, Salvatore Panico, seeking review of his (Salvatore's) conviction for contempt of court and presenting as the primary issue whether Salvatore was mentally competent to commit such contempt (the petition referred to is No. 633 at the October 1962 term and is still pending undecided) there were filed in this Court, *inter alia*, nine extra copies of the Panico brothers' printed supplemental appendix in the appeal from the instant narcotics conviction, and nine extra copies of their printed brief in that appeal. See the discussion of these last mentioned items in the "Petitioner's Reply Brief" on behalf of Salvatore Panico in No. 633, at pages 3-4, where the petition therein prayed this Court to give attention, particularly, to the aforementioned printed brief in the court below. At pages 6-42 and 44-61 of that printed brief there is extensive treatment of matters which are also relevant to the instant petition for certiorari (i.e. relevant to the matters embraced in our last preceding sub-heading), plus what we think are meticulous citations to the relevant stenographic minutes of the instant narcotics trial. Also, many of the more important portions of those trial minutes which are cited in our afore-

said printed brief in the Court below are set forth *in extenso* in the aforementioned printed supplemental appendix of which nine copies were filed in this Court on behalf of Salvatore Panico in No. 633.

At pages 6-15 of the aforementioned printed brief in the Court below (again, we are referring to the brief of which nine extra copies were filed herein in No. 633), there are described in detail the pretrial proceedings in the instant case which resulted in both of the Panico brothers being forced to proceed to trial on April 2, 1962 without the counsel of their own choice (Mr. Aronne), but instead with peremptorily court-assigned counsel (Mr. Todaro) who was simultaneously assigned to represent also another defendant (Loicano).

At pages 16-26 of the aforementioned printed brief are set forth in detail the happenings from April 2, 1962 (the commencement of the trial) to the morning of April 12, 1962, during which the matter of the Panicos' and Loicano's representation by counsel was in a continuous and total state of impasse. During that period the jury was chosen, the opening statements to the jury were had, and the Government put in the principal portion of its testimony on the crucial substantive counts of the indictment (which were inextricably connected with the conspiracy count, and which served as the basis for the Government's introduction in evidence of massive quantities of seized narcotics), all without any participation on the part of counsel for the Panicos (or Loicano).

At pages 26-30 of the aforementioned printed brief the relevant details are presented as to the period of the trial from the afternoon of April 12, 1962 (when the Panicos' chosen counsel, Mr. Aronne, returned to the trial) to May 23, 1962. During this period the Trial Court intensified its abusive treatment of defense counsel, and the mount-

ing pressures which were ultimately to result in the mental breakdown of Salvatore Panico during the trial was likewise strongly intensified (*ibid.*)

At pages 31-38 of the aforementioned printed brief the happenings from May 23, to June 5, 1962 are described. Salvatore's violent outburst of the former date—in which he charged into the jury box screaming obscenities—having led, during the ensuing days, to a series of disruptive incidents and extraordinarily oppressive actions by the Trial Court. During this same period also (see the aforementioned printed brief at pp. 34-36) took place the first psychiatric examinations of Salvatore Panico and the Trial Court's refusal to sever him despite the prediction of one of the psychiatrists—later tragically confirmed as having been all too correct—that Salvatore's condition (which was described as psychotic) would get worse if the pressures upon him were not eased (see the aforementioned printed brief at pp. 35-36).

On May 31, 1962 Salvatore had another outburst, and the Trial Court ordered that he be gagged (6083). When Salvatore was brought back to the courtroom gagged and shackled, his brother Carmine, the instant petitioner, said—"Your better gag me too" to which the Court rejoined "I will. Gag him too." When Mr. Aronne pleaded with the Court that Carmine is "emotionally upset because of his brother's condition" the Court's reply was "That may be. He is going to be gagged" (6088-6091).

This gagging of the petitioner Carmine Panico on May 31, 1962 had been preceded by only one other incident on the part of Carmine which could conceivably have justified this drastic action by the Trial Court, namely, remarks by Carmine at the sight of his brother Salvatore's violent outbursts of May 23, 1962 previously noted when Salvatore charged into the jury box, at which time, immediately after Salvatore "still screaming" was dragged out of the court-

room by the marshals, the following had occurred (5639-5639a):

> "Defendant Carmine Panico: I want to see my brother.
>
> The Court: Sit down.
>
> The Clerk: Be seated.
>
> The Court: Carmine Panico, you may go back in here (pointing to the cell block behind the court room) and see him when he calms down.
>
> Defendant Carmine Panico: ([To the Court]) You think that he's all right. What you're doing, it is a shame, it ain't fair, to allow a frame. A lousy bum like that. [Pointing to the Court.] A shame in your heart that you stand up there near the flag which I served for.
>
> The Court: (To the deputy marshals) Take him in back.
>
> Defendant Carmine Panico: [Pointing to Court and Prosecutor] It is a dirty shame what you are doing, to ruin families, you bastards.
>
> (The defendant Carmine Panico was taken out of the courtroom by the deputy marshals.)"

A full week had elapsed, as of May 31, 1962, the date of Carmine's gagging, following the above incident of May 23, 1962, during which time Carmine's behavior had been unexceptionable despite the severe emotional stress under which he was laboring out of concern for his brother Salvatore; and, we repeat, Carmine had not theretofore given any other cause for disciplinary treatment.

From the time on May 31, 1962 when Carmine (and Salvatore) were gagged and shackled, the trial resembled more a series of intermittent scenes from Bedlam than an American courtroom of justice. With the two Panico brothers sitting in the courtroom bound and gagged before the eyes of the jury, with Salvatore continuing to suffer his

psychotic outbursts—in words, whenever the gag happened to be removed; by grotesque pantomime movements, while the gag was on him—there was from this point on, and there could be, no trial in any realistic sense of that word. Their necks and heads torn by the adhesive tape of the gags placed upon them on the first day of the gagging (6156—more "comfortable" gags were later ordered by the Court), their bodies cramped by the ever-present shackles, and most important of course, their spirits crushed by the humiliation of wearing these regalia of bodily restraint, the Panico brothers were obliged to sit through the ensuing two weeks and more of this trial, day in and day out, because the Trial Court believed that Salvatore's conduct was part of a mass plot by the defendants and all of their attorneys to disrupt the trial.

When, a little later on May 31, 1962, Mr. Aronne pleaded with the Court to accept Carmine Panico's apology on the ground that he was under emotional pressure and to relieve him of his gags and shackles in view of the fact that he intended to take the stand soon to testify in his own behalf, the Court said that he could not "take the chance". The Court also said that Carmine had called the Court "a bastard in open court" (6174)—as seen, this had occurred a full week earlier. Then, referring to his oft-repeated theme that the lawyers were somehow responsible for the situation the Court said "I warned them all. I begged the cooperation of every lawyer in this courtroom" (6175).

Salvatore's outbursts continued (June 5, 1962—6623, 6650-6651; June 6, 1962—6790-6792, 6803-6804, 6827-6828, 6844). Mr. Aronne kept urging upon the Court the harmfulness of the continuing emotional pressures upon Salvatore (e.g., 6623, 6650-6651).

Under these pressures, it then came about that on June 7 and June 8, 1962 Salvatore made those attempts at suicide

which have been fully described in the papers filed on his behalf in No. 633.

When the Panico brothers were brought into court after Salvatore's first suicide attempt—on the morning of June 7—the petitioner Panico, whom the Court a few days earlier had permitted to be free of the gag, appeared before the eyes of the jury again wearing his gag (6989-6990a, 6996-6997, 7149). Carmine remained thus gagged for the duration of the trial, a fact which evoked repeated objections and requests for relief on the part of the defense owing to its extremely prejudicial effect upon Carmine's chances of fair consideration by the jurors, who would naturally assume that the reimposition of the gag upon Carmine was caused by some new malefactions of his own, which was not the case at all (*ibid.*, 7223, 7317-7318, 7371-7373, 7896, 8118, 8332-8333).

Our aforementioned printed brief in the Court below, at pages 38-42, describes further the suicide attempts of Salvatore Panico, the subsequent further psychiatric re-examination (which had to be forced upon the Trial Court by a *mandamus* from the court below), and the subsequent events of the trial which pertained to the matter of Salvatore's mental condition and the prejudicial consequences thereof to the instant petitioner Carmine Panico. The Court will also please see the papers filed on behalf of Salvatore Panico in No. 633 which disclose his ultimate fate—confinement in a State mental institution for the criminally insane as a schizophrenic.

On June 11, 1962, shortly after Salvatore's second suicide attempt, a revealing incident in the trial as to the Court's own emotional affect towards the Panicos (as towards all of the defendants), came when the Court spoke of the gags on the Panico defendants as "muzzles"—an apt term to describe the condition of creatures who are be-

ing treated like dogs rather than human beings. (7252). A little later that same day the Court's simplistic approach to the situation was again indicated when, in response to a new defense request to remove the gag from Carmine, the Court refused on the ground that he had seen Carmine "looking daggers" at him (7317-7318, 7371-7373).

On June 20, 1962 the Court refused a defense request to remove the gag from Carmine during the summation, even though Mr. Aronne said "I could give my word, your Honor, that there won't be any outburst" (8332-8333).

A further word concerning the circumstances of the physical restraints imposed upon the petitioner Carmine Panico during his own testimony on the stand in this trial: On June 1, 1962 the gag was removed from Carmine when he took the stand to testify in his own behalf, and his hand shackles were removed, but he was secured to the chair by leg irons (6318-6319). At this time Mr Aronne, again told the Court that Carmine "was just emotionally upset the other day, seeing his brother's plight", and asked the Court to reconsider having him shackled during his own testimony on the stand, to which the Court replied "I've got him there now. Let's see how he behaves" (6319). At the end of Carmine's testimony the Court commended him for his "good impression on this jury" and offered to relieve him of all shackles, handcuffs, and the gag if he would promise there would be no outburst from him, which Carmine did promise, and he was thereupon relieved of the restraints (6337-6338). However the leg chains had remained on him throughout his testimony and Mr. Aronne said "I would like the record to show that when he tried to get up, the jury heard the chains rattling and saw them" to which the Court responded "they may have heard them" (6338). Carmine remained free of the restraints for the next six days, but as above noted, sud-

denly he was brought back into the courtroom on June 7, 1962 once again gagged, handcuffed and shackled (6989-6989a, 6996-6997, 7149). Seemingly the only reason why Carmine was again gagged and shackeld on June 7 was that Salvatore on the preceding night had made his first suicide attempt. As noted *supra*, Carmine thereafter remained gagged and shackled for the duration of the trial, and repeated requests to relieve him of the restraints were denied. Literally the only item in the record that we have been able to find which explains this continued gagging and shackling of Carmine is the Court's remark on June 11, 1962 that he was going to keep Carmine under these restraints because Carmine was "looking daggers" at the Court (7371-7373).

An idea of Carmine's general course of behavior during this trial may be had from reading the Court's contempt citation against Carmine, which was based, it would appear, upon a fine-toothed combing of the record (9115-9118). The Court there charged Carmine with only two allegedly contemptuous incidents, one being his own emotional outburst at the time of Salvatore's major breakdown on May 23—which, as seen, did not even cause the Court to have Carmine placed under restraint; and the incident above described when Carmine said "You better gag me too".

In the brief filed in the court below on behalf of the Panico brothers (the aforementioned printed brief of which nine copies are on file in this Court) it was urged as a distinct point of argument (Point V) that Carmine especially, had been denied a fair trial by the circumstances arising from the Trial Court's orders that he be shackled and gagged in the courtroom. The opinion of the Court below makes no mention of this point in relation to Carmine Panico, but merely finds in conclusory terms that

the Trial Court committed no abuse of discretion "in ordering some of the defendants gagged and shackled" and in the "actions taken to preserve the security of the courtroom" (Appendix hereto, *infra*, 26a; see also id. 24a).

It is important to note that the Court below, in passing upon the vital issues as to the mental condition of Salvatore Panico during this trial, did nothing more than to adopt as dispositive of those issues the prior opinion of the Court in Salvatore's contempt appeal, *United States* v. *Panico*, 308 F. 2d 125—as to which Salvatore's petition for certiorari is still pending in this Court (No. 633, October Term 1962).

On this basis, the court below ruled, Salvatore Panico "stands in no different position than the other unruly defendants and, * * *, there was no abuse of discretion in refusing to grant a severance * * *" (Appendix hereto, *infra*, 29a). We argue *infra* that the denial of a severance to Salvatore Panico resulted in making it impossible for the petitioner Carmine Panico to have a fair trial.

5. The Instructions to the Jury; the Jury's Deliberations.

The Trial Judge in effect took away from the Jury the factual issue of whether the accomplice witness Smith was actually an accomplice and in effect instructed them that Smith was an accomplice as a matter of law (J113a-134a), over defendants' exception (J220a-222a). The opinion of the Court below held that the Trial Court did not commit error in this respect (Appendix hereto, *infra*, 49a, fn.).

As noted at page 13, *supra*, the Trial Court *twice* charged the Jury positively that the "he" referred to in Smith's crucial testimony concerning a conversation about the making of a narcotics "run" was the petitioner Carmine Panico (8811, 8814). The opinion of the Court below, as

seen (p. 11, *supra*) treated this same ambiguous testimony of Smith, without discussion, as referring to Carmine.

The Trial Court's instruction to the Jury had the effect of spot-lighting the fact that Salvatore Panico did not take the stand (J135a)—this, even though Salvatore had wanted to take the stand but had been refused the right to do so by the Trial Court. If certiorari is granted we shall argue that this had a prejudicial effect upon petitioner Carmine Panico through his indivisible association in the Jury's eyes with his brother Salvatore. The opinion of the Court below does not refer to this.

From the tenor of the Jury's requests for the reading of testimony and for additional instructions during its deliberations, it is evident that the jury considered Carmine and Salvatore indivisible—there portended a verdict of either guilty as to both Panico brothers or an acquittal as to both. The Jury requested the testimony of Frank Mancino and Frank Randazzo pertaining to the "Panico brothers, Carmine and Salvatore"; and for all the testimony of Carmine Panico (9002). The Jury began their deliberations on June 21 at 6:43 P.M. (8865). On June 25th, at 5:05 P.M. the Court told Panicos' counsel and Government counsel that it had received a note from the foreman of the Jury which stated that one of the jurors would like to have read that portion of the Court's charge as pertains "to the specific points to be considered in determining the guilt or innocence of Carmine and Sal Panico." (9022). On June 25th at 6:48 P.M. the Jury brought in its verdict of guilty as to all defendants (9027). Thus, until the final hour of its four-day deliberation, the Jury was concerned about the Panicos. The Jury evidently considered the two Panicos as two peas in a pod. If prejudicial error affected one brother, the other of necessity was prejudiced.

Reasons for Granting the Writ

1. Consider the two prime vices generated by the mass conspiracy ordeal of this trial, namely, the impasse between Court and defense on the issues of adequate representation by counsel, and the fiasco (nightmare might be the better word) of the breakdown of courtroom orderliness. The peculiar pressures to which both defense counsel and the defendants themselves were subjected by the Trial Judge were not merely the result of ill advised actions by the Judge, but to a significant degree the Judge himself was helpless to do otherwise than he did because he was attempting the impossible. The ultimate responsibility for what happened in this case lies at the door of those who invented, fostered, and continue to condone the mass conspiracy device.

As fair trial, this entire proceeding was a grotesque failure, disintegrated by contending wild forces that caught up the defendants and the Court alike. As a human episode —we take it that we need not cite authority for the proposition that due process is an expression of civilized humaneness—this proceeding was outrageous because it froze the life out of the entire defense (most especially the defense of the Panicos) through the destruction of the right of counsel, and because it literally blasted the psychological life out of defendant Salvatore Panico and made a hell of barbarous inhumaneness out of the "fair trial" of both Salvatore and his brother Carmine.

The injustice of the mass-conspiracy trial procedure exerts in this case a quite concrete impact with particular regard to the rights of petitioner Carmine Panico. The proof of petitioner's guilt under the narcotics conspiracy indictment was of the flimsiest sort, as we tried to demonstrate in detail in our statement of the case (pp. 8-15, *supra*).

A conviction upon proof of this poor quality cannot be explained, or condoned, on the objective merits of the prosecution's showing; explained it can be, but only as an unjust consequence of the unjust device of mass-conspiracy indictment and trial, with its emanative associations of collective guilt.

The situation is pre-eminently a suitable one for the exercise of the certiorari jurisdiction in pursuance of this Court's power to supervise the proper administration of Federal criminal justice.

2. We are informed that an argument closely similar to the one we are now about to advance as our second "reason for granting the writ," is presently before this Court in another petition for certiorari now pending (Elliott Kahaner v. United States). We have seen a copy of the latter petition, and we take the liberty of adapting its argument:

The cumulation of trial errors and prejudicial circumstances in this case, especially when weighed in the setting of the exceptional weakness of the proof of petitioner Carmine Panico's guilt, should be considered in the following light: In recent decades there has occurred a gradual dilution of several of the chief traditional standards of fair trial in federal criminal cases, resulting in a condition at the present time which may not unfairly be described as a general degradation of the overall standards of trial fairness in federal criminal proceedings. The instant case is distinctively one in which the highest Court of the land may properly be asked to review the conviction as a test of this overall degradation process.

Without the degraded trial standards of which we are speaking—in a moment we shall be specific—a decent, hard-working family man of unblemished prior record like Carmine Panico could never have been convicted in this case. Without these degraded standards the case could not

have gone to the jury in the way it did (indeed it could not have gone to the jury at all), the entire fact-trying structure could not have been what it was.

The degradation of standards of which we speak has gone so far that decent, ordinary citizens of unblemished repute can be as easily destroyed in today's federal criminal "trial" forum as can persons of the most sordid background.

The degraded standards above referred to will now be summarized (not necessarily in the order of their importance):

First and *second*, the conspiracy-indictment device, plus the rule of admissibility of uncorroborated accomplice testimony (see authorities *infra*), render fair trial of the issue of individual guilt or innocence very difficult to secure owing to the combined effect of guilt by testimonial association and intrusion into the proof of low-quality evidence—which, in turn, *third*, results in undercutting the protective principles of presumption of innocence and reasonable doubt.

We especially urge that this is a suitable case in which this Court should reexamine and modify the federal rule that accomplice testimony does not require corroboration. Carmine Panico's conviction was based solely on such testimony (and on the associative emanations from the testimony relating to other defendants). In the circumstances of this trial, where the Government's case against petitioner Panico was solely dependent upon the testimony of a solitary alleged accomplice witness whose credibility was of the basest character, whose motives of self-preservation were of the most compelling sort, and whose testimony was undisputedly ridden with discrepancies and falsities on vital points, a proper situation is presented, in the interest of the fairness of federal criminal justice, for modification of the usual federal rule dispensing with the

need for corroboration of accomplice testimony. The only explicit declaration which has ever been made on the subject by this Court is merely a statement that no absolute requirement of such corroboration exists. *Caminetti* v. *United States*, 242 U. S. 470, 495-496. Ample precedent exists in other jurisdictions for the requirement of corroboration of accomplice testimony. *Wigmore On Evidence* (3d Ed.), §§2056-2059.

Fourth, further as to the impact in this case of the way in which the rule of reasonable doubt was administered by court and jury, the overall degradation of standards above noted emphasizes the need for consideration, by this Court, of the earnest and scholarly proposals of Circuit Judge Jerome Frank in his concurring opinion in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2 1956), that the federal trial and appellate courts should determine whether a criminal case is improper for submission to the jury because reasonable men could not differ in believing that a reasonable doubt exists—we do not think it is necessary to emphasize how aptly the aforesaid proposed rule would apply in the instant case.

On issues of right so fundamental as these, and notwithstanding the neglect of the defense in not urging or preserving its position on all of said issues in the Trial Court, it is submitted that this Court may consider the points under the authority of Rule 52(b) of the Federal Rules of Criminal Procedure. Cf. *United States* v. *Sherman*, 200 F. 2d 880, 883 (C.A. 2 1952); *Jackson* v. *United States*, 221 F. 2d 883 (App. D.C. 1955); *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2 1947), *cert. den.* 331 U. S. 831.

3. The overall circumstances at the trial arising from the abnormal conduct of Salvatore Panico and from the

Trial Court's refusal to sever Salvatore, resulted in a denial of fair trial to petitioner Carmine Panico.

It was error for the Trial Court not to sever the trial of Salvatore Panico on and at various times after May 23, 1962—the date of Salvatore's first and most violent outburst. Such severance should have been granted either by way of implementation of the provisions of 18 U.S.C. §4244, relating to mental incompetency after arrest and before sentencing, or under Rule 14, F. R. Cr. P., or both. *Schaffer* v. *United States*, 362 U. S. 511, 516 states the "continuing duty" of the trial judge "at all stages of the trial to grant a severance" in administering the provisions of Rule 14.

Because of the indivisibility, in the Jury's minds, of the question of the guilt or innocence of the two Panico brothers, it is manifest that, of all the defendants in this trial who were prejudiced by the failure to sever Salvatore and thereby exclude from the case the prejudicial atmosphere generated by his insane conduct, the defendant who stood in direst peril of such prejudicial consequence was the petitioner Carmine Panico.

The Trial Court twice proceeded under the provisions of 18 U.S.C. §4244, once at its own instance and a second time (after Salvatore's suicide attempts) under the mandate of the Court of Appeals. The Trial Court committed abuse of discretion under the Statute in not declaring Salvatore incompetent to stand trial after each of those psychiatric-examination procedures. The second of those examinations (by Dr. Hyslop, after the suicide attempts) was utterly inadequate from a medical standpoint, should not have been acted upon by the Trial Judge adversely to the request made on behalf of Salvatore that he be declared not competent, and should have been supplemented by further examination which the Court should have ordered.

Further, it was error to deny the several subsequent requests on Salvatore's behalf for a further and renewed psychiatric examination.*

This Court may independently evaluate the record, *nunc pro tunc*, to determine whether Salvatore's rights under 18 U.S.C. §4244 were violated by the Trial Judge. *Dusky* v. *United States*, 362 U. S. 402; *Van De Bogart* v. *United States*, 305 F. 2d 583 (C.A. 5, 1962); *Kenner* v. *United States*, 286 F. 2d 208, 211 (C.A. 8, 1960). Cf. *United States* v. *Walker*, 301 F. 2d 211 (C.A. 6, 1962).

Nor can there be any doubt that the defense requests for renewed psychiatric examination of Salvatore, based upon new and changing facts, properly called upon the Trial Court to exercise powers conferred upon him by 18 U.S.C. §4244. *Fugner* v. *United States*, 302 F. 2d 214, 239 (C.A. 8, 1962). Cf. the cases which emphasize that a determination as to mental competency under the latter statute applies only to the time at which such determination was made: *Crabtree* v. *United States*, 209 F. 2d 164, 165 (C.A. 5, 1953), cert. den. 347 U. S. 961; *Wells* v. *United States*, 239 F. 2d 931 (C.A. D.C. 1956); *United States* v. *Bostic*, 192 F. Supp. 170 (D.D.C. 1961); *Higgins* v. *McGrath*, 98 F. Supp. 670, 674 (W.D. Mo. 1951).

"It is axiomatic in modern procedure that one who continues incapacitated by lack of understanding must never be tried or convicted of crime. A trial or judgment of conviction of such a person *is without jurisdiction* because of lack of due process". *Smith* v. *United States*, 267 F. 2d 210, 211 (C.A. 9, 1959) (italics added). To similar effect, see *Van de Bogart* v. *United States*, 305 F. 2d 583, 584 (C.A. 5, 1962) stating "* * * our basic notion that those incapable

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* See pp. 17, 20, *supra*; and see especially the showing made on petitioner Salvatore Panico's behalf in No. 633, October Term, 1962 (still pending).

of understanding the nature of the proceedings taking place ought not to be tried", and that "* * * every case must be measured in * * * terms of fundamental satisfaction of that ideal."

This Court has not left it in doubt that the duty of a trial judge in administering the humane (and jurisdictional—as just noted) requirements of 18 U.S.C. §4244 is called upon to do more than a perfunctory job of uncritically ratifying indicatedly dubious or insufficient findings of the psychiatrists. *Dusky* v. *United States*, 362 U. S. 402. Cf. *Kenner* v. *United States*, 286 F. 2d 208, 211-212. The statute imposes on the trial judge an independent responsibility to exercise his own discretion. That responsibility was not discharged by the Trial Judge in this case. The detailed information on this subject in the record which we have extensively catalogued in our statement of the case (*via* references to the papers in No. 633)—especially the indications from the time of the first examination that Salvatore would get worse unless the pressures upon him were eased, the patently "brushover" approach of Dr. Hyslop in the second examination (after Salvatore's suicide attempts), and the deadly fact that *two days* after being sentenced Salvatore was pronounced by the prison psychiatrist to be schizophrenic (a conclusion judicially confirmed shortly thereafter)—show compellingly that the Trial Court was wrong. And, as seen (p. 23, *supra*), the Court of Appeals did not even purport to review this vital phase of the case in the instant appeal, but rested on its barely less perfunctory conclusion in Salvatore's contempt appeal (now pending here as No. 633).

4. At pages 15-16, *supra* we collect the materials (including references to certain printed items heretofore filed in this Court in connection with Salvatore Panico's petition in No. 633) which depict the Trial Court's unsympathetic

reactions to the Panicos' difficulty in obtaining counsel prior to the second trial. As seen, shortly before the second trial was to begin, the Panico brothers, bowing to the Trial Court's arbitrament, reconciled themselves to having Mr. Aronne as their attorney for the re-trial. In this they did, at any rate, have the substantial consolation that, as the Trial Court had been advised, they and Mr. Aronne were long-time friends. They trusted Mr. Aronne.

It then came to pass, through no fault or doing of the Panicos or Mr. Aronne, that the Trial Court adjourned the retrial from March 19, to April 2. Counsel had been told by the Trial Court to hold themselves as "actually engaged". However, near the end of March Mr. Aronne found himself faced with a situation in a state court matter where the Judge declined to accept the obvious "fiction" that Mr. Aronne was "actually engaged" in the retrial of the instant case, and Mr. Aronne was forced to trial in the state court, necessitating a delay of perhaps a week to ten days for the Panico defense in this trial by Mr. Aronne—all of which was fully explained to the Trial Court on March 29, 1962.

Over the weekend of March 29-April 2, 1962, the Trial Court apparently determined that, one way or another, the Panicos (and the rest of the defendants) were going to go to trial on the morning of April 2 as scheduled. Hence the relentless conduct of the Trial Judge at the final pre-trial on the morning of April 2, 1962, when a lawyer who was actually on his way out of the courtroom with no obligations towards any defendant in this trial (Mr. Todaro) was abruptly stopped by the Trial Court and just as abruptly "assigned" not only to the Panicos, but also to defendant Loicano. This lawyer assured the Court that he knew nothing about the Panicos' or Loicano's case, and that the defendants to whom he had thus been assigned absolutely did not want his services.

As seen, the Court nevertheless rammed the trial forward, with all the distressing incidents earlier noted. During the time that the Panicos were without representation by the attorney of their own choice, Mr. Aronne, a jury was empanelled, the opening statements were had (none for the Panicos), and virtually the entire testimony for the Government on the Fourth and Fifth Counts of the indictment —the substantive counts, which involved alleged happenings which also formed a vital part of the corpus of the Government's proofs for the conspiracy count—was laid before the jury.

We submit that the circumstances did not justify the Trial Judge in forcing the Panicos to stand trial without the counsel of their own choice.

Moreover, because all of these trial happenings during the period when the Panico defendants were theoretically represented by Mr. Todaro took place under circumstances of acrimonious impasse (as was naturally to be expected), a prejudicial aura was created which then and later in the trial made it impossible for the Panicos to get fair minded consideration from the jury. The denial of their Sixth Amendment right to counsel coalesces, then, with the denial of the Panicos' right to due process of law and fair trial. There was inevitably created before the eyes of the jury an impression of guilt-seeming obstruction on the part of the Panicos wholly without their own fault.

The denial of the right of the Panico defendants to adequate counsel of their own choice was a violation of the Sixth Amendment of the Federal Constitution, a matter of traditionally major concern to this Court. *Glasser* v. *United States*, 315 U. S. 60. See especially *Releford* v. *United States*, 288 F. 2d 298 (C.A. 9, 1961). See also *Johnson* v. *Zerbst*, 304 U. S. 458. The Sixth Amendment guarantees this right to the accused at every stage of the proceed-

ings. *Snell* v. *United States*, 174 F. 2d 580 (C.A. 10, 1949); *Wilfong* v. *Johnston*, 156 F. 2d 507 (C.C.A. 9, 1946).

The denial of the Panicos' Sixth Amendment right to counsel in this trial arises in yet another way. For the Trial Court to assign the same counsel (Mr. Todaro) to the Panicos and to defendant Loicano was a violation of the respective rights of those defendants under the Sixth Amendment to have their own respective, independent counsel without being joined in co-representation with other defendants whose interests in the trial were in conflict with theirs. Carmine Panico swore on the stand, that he did not know any of the other defendants in this case (6331-6334) (Salvatore was not permitted to testify in his own behalf). For the Panicos to be linked with Loicano in the jury's eyes, as they inevitably must have been when the jury saw the same lawyer in court for the three of them, was therefore prejudicial as tending naturally, in the juror's minds, to negate Carmine's claim that he did not know any of the defendants. This enforced linkage of the Panicos with Loicano through the assignment of joint counsel was improper as a denial of the Panicos' Sixth Amendment right to adequate counsel within the meaning of *Glasser* v. *United States*, 315 U. S. 60; *Kyle* v. *United States*, 263 F. 2d 657 (C.A. 9, 1959); *Taylor* v. *United States*, 226 F. 337 (C.A. D.C. 1955); *Stern* v. *United States*, 219 F. 2d 263 (C.A. 4, 1955).

The opinion of the Court below (Appendix, *infra*, p. 41a) erroneously states that, in regard to the representation of counsel for the Panicos and Loicana, "no conflict of interest is pointed to by appellants and none is apparent to us." We respectfully note that such conflict of interest was pointed to by the appellants both in the Panicos' and in Loicano's briefs in the appeal. In the Panicos' brief (pp.

52-53) the conflict of interest was specifically described and was demonstrated as having been prejudicial to the Panicos along lines similar to those in our next-to-last immediately preceding paragraph, *supra*.

5. The court below seems to have ignored completely our points specifically addressed to the physical restraints which the Trial Court placed upon petitioner Carmine Panico during the trial. These restraints were prodigiously disproportionate to what any reasonable necessity could even remotely have called for. The Trial Court's gross abuse of discretion in this matter of the physical restraint placed upon the Panico brothers during the trial, especially so in the case of Carmine, appears in an even more shocking light when consideration is had of the fact that the Trial Court had open to it the far more reasonable alternative of severing Salvatore from the trial and thereby terminating any necessity for continuing the restraints upon Carmine, whose potential conduct which the Court professed to fear was understood by everyone as being related to emotional distress over the condition of his brother Salvatore.

As seen, the gag was (necessarily) removed from Carmine when he took the stand to testify. However, the leg shackles were not removed. There was no reason to compel Carmine Panico to testify with chains attached to his legs.

Furthermore the re-gagging of Carmine Panico on June 7—apparently because the Court feared outbreaks following Salvatore's suicide attempt—was prejudicial because the Jury would naturally believe that Carmine had committed a new indiscretion.

In *Odell* v. *Hudspeth*, 189 F. 2d 300, 302 (C.A. 10, 1951), cert. den. 342 U. S. 873, the Court, after referring to the familiar rule that "the necessity of the use of manacles on

a defendant [is] within the sound discretion of the Trial Court", went on to say: "An abuse of this discretion, coupled with an unusual display of hostility toward a defendant, might well reach a point where the trial is a farce and a fair trial impossible." These words, we submit, aptly describe what happened in the instant trial.

While the Trial Court's discretion in these matters is a large one, to be sure, it is well to remember that the occasions for the exercise of this discretion are extraordinary ones. The rule has been well summarized in the frequently cited statement in 14 Am. Jur. 855, 856:

> "* * * In exercising its discretion the court must have some reason, based on the conduct of the prisoner at the time of the trial, to authorize so important a right to be forfeited. There must be some immediate necessity for the use of shackles."

See also 23 C.J.S. 904-907.

Before concluding this point we respectfully invite the Court's attention to the specific feature that the restraints placed upon the Panico brothers in this trial included not merely shackling, but also *gags*. We emphasize this for the following reason: A complete search of all of the American "key number" digest systems, including descriptive word indexes, and of all indexes and descriptive word listings in the major legal encyclopedias has disclosed only two American cases where a prisoner was gagged in the courtroom, as distinct from being merely shackled. In *People* v. *Loomis*, 80 P. 2d 1012 (Cal. App. 1938), the use of the gag was upheld on appeal, but in a factual situation which was incomparably more urgent and necessitous than the situation involving Carmine Panico in our case; moreover, the severity of the gag-restraint imposed was far less than that in the situation of either of the Panicos in this

case. The only gag used in the *Loomis* case was "that at times, a towel [was] placed over his mouth" (80 P. 2d at 1014). *State* v. *Van Bogart*, 331 P. 2d 597 (S. Ct. Arizona 1958), likewise involved facts wholly distinguishable from those as to Carmine Panico in the instant case. The defendant in *Van Bogart* was gagged only during an early stage of the trial, and this was done because he irrepressibly insisted upon making virtually continuous outbursts; but shortly after this "the gag was removed and defendant was permitted to represent himself throughout the trial" (331 P. 2d at 599).

In view of the dearth of authority on the question of the power to gag a defendant in the courtroom, as distinct from the power to shackle him, and in view of the obviously more drastic character of gagging as compared with shackling, we respectfully submit that the gag aspect in the instant case as affecting Carmine Panico is a strong additional reason for this Court to grant certiorari in the interests of reviewing this extraordinary trial record as a whole from the standpoint of fairness—indeed of humaneness—in Federal criminal trials.

6. The erroneous ruling of the Trial Court—resulting in reversal of the conviction of Salvatore Panico—which prevented Salvatore from taking the stand was prejudicial to the petitioner Carmine Panico as well, in that thereby Carmine was deprived of the opportunity to have placed before the Jury exculpatory evidence affecting him. The opinion of the court below (Appendix hereto, *infra*, pp. 58a-59a) states that this was not prejudicial to Carmine because Salvatore's evidence would have been merely "cumulative" of Carmine's own self-exculpatory testimony. The trial record clearly shows that Carmine wanted his brother to testify (8266). The opportunity of an accused to meet the

prosecutor's case with the aid of witnesses is historically and in practice fundamental to a fair trial. * * * He must have the opportunity to be heard and to call witnesses in his own defense. This is the very essence of due process of law * * *". *Hague* v. *C.I.O.*, 101 F. 2d 774, 782 (C.A. 3, 1939), mod. on other grounds and affd. 307 U. S. 496.

7. The Trial Judge's instruction which took away from the Jury, in effect, the factual issue of whether Smith was actually an accomplice and in effect instructed them that Smith was an accomplice as a matter of law (p. 23, *supra*) was prejudicial error, which so fundamentally touches the proper and constitutional relationship of Judge and Jury in Federal criminal trials that this Court should intercede. Cf. *Holmgren* v. *United States*, 242 U. S. 470, 495; *Phelps* v. *United States*, 252 F. 2d 49, 53 (C.A. 5 1958); *United States* v. *Vanco*, 131 F. 2d 123, 126 (C.C.A. 7 1932); *United States* v. *Baladimas*, 177 F. 2d 485, 488 (C.A. 7 1949).

8. Petitioner Carmine Panico also respectfully adopts, insofar as applicable to his case, the grounds for certiorari presented in the companion petitions for certiorari on behalf of his fellow defendant-petitioners in this case.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted. It is also submitted that, in the event that the Court is not prepared to grant this petition on the sole and distinct basis of the matters presented herein, the disposition of the petition should be deferred pending the Court's ruling upon the petition of Salvatore Panico pending in No. 633; for, if the latter petition is granted, an ultimately just and final determination

as to the legality of the conviction of Carmine Panico may have to be postponed until after Salvatore Panico shall have had a new hearing as to his mental competency.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner, Carmine Panico

[Appendices follow]

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 237—October Term, 1962

(Argued January 30, 1963 Decided June 13, 1963)

Docket No. 27733

UNITED STATES OF AMERICA

Appellee,

v.

WILLIAM BENTVENA, CARLIE DI PIETRO, JOSEPH FERNANDEZ, CARMINE GALANTE, ANGELO LOICANO, FRANK MANCINO, ANTHONY MIRRA, SAMUEL MONASTERSKY, JOHN ORMENTO, CARMINE PANICO, SALVATORE PANICO, SALVATORE SCIBEMAMMANO and WILLIAM STRUZZIERI,

Defendants-Appellants.

Before:

MOORE, SMITH and HAYS, *Circuit Judges.*

Appeals by thirteen appellants from judgments of conviction for violation of and a conspiracy to violate the

federal narcotics law, 21 U. S. C. §§ 173, 174; after a trial by jury before Lloyd F. MacMahon, Judge, in the United States District Court for the Southern District of New York. The judgments of conviction of Bentvena, Monastersky and Struzzieri on the substantive and conspiracy counts are reversed, and the substantive counts are remanded for a new trial; the judgment of conviction of Salvatore Panico on the conspiracy count is reversed and remanded for a new trial; the convictions of all other appellants are affirmed.

JONATHAN L. ROSNER and ARTHUR I. ROSETT, Assistant United States Attorneys (Robert M. Morgenthau, United States Attorney for the Southern District of New York, William M. Tendy and Arnold N. Enker, Assistant United States Attorneys, on the brief), *for the appellee.*

JEROME LEWIS, Brooklyn, N. Y., *for appellants, Bentvena, Carmine Panico, Salvatore Panico* and *Struzzieri.*

HARRIS B. STEINBERG, New York, N. Y., *for appellant, Di Pietro.*

NATHAN KESTNBAUM, New York, N. Y., *for appellant, Fernandez.*

O. JOHN ROGGE, New York, N. Y., and FRANCIS KAHN, New York, N. Y., *for appellant, Galante.*

ABRAHAM GLASSER, New York, N. Y., *for appellants, Loiacano* (Sylvester Cosentino, New York, N. Y., on the brief), and *Sciremammano*

(George Todaro, New York, N. Y., on the brief).

CONSTANTINE N. KATSORIS, New York, N. Y., *for appellant, Mancino.*

WILLIAM R. LUNEY, New York, N. Y., *for appellant, Mirra.*

RICHARD V. GIORDANO, New York, N. Y., *for appellant, Monastersky.*

JACOB KOSSMAN, Philadelphia, Penn., and ALBERT J. KRIEGER, New York, N. Y., *for appellant, Ormento.*

MOORE, *Circuit Judge*:

This is an appeal by thirteen defendants from their convictions for violations of the federal narcotics laws, 21 U. S. C. §§ 173, 174. The indictment, filed on May 5, 1960, contained eight counts, and named twenty-nine defendants. Counts one through seven charged various defendants with substantive violations; count eight charged all of those named with conspiracy to violate the narcotics law. The trial from which this appeal is prosecuted was the second trial on this indictment. The first trial, before Judge Levet and a jury, ended in the declaration of a mistrial after a trial of six months.

This retrial of fourteen of the defendants began before Judge MacMahon and a jury on April 2, 1962, on counts

four and five, charging sales of narcotic drugs, and count eight charging a conspiracy to import and distribute drugs.[1] On June 19, 1962, the trial court granted a motion for judgment of acquittal as to the defendant, Frank Mari, and on June 25, 1962, the jury returned a verdict of guilty as to the thirteen appellants on all counts in which they were named. Sentencing took place on July 10, 1962.[2]

Appellants, together with their co-defendants and co-conspirators, were charged with a conspiracy to import large amounts of narcotic drugs into the United States from Canada, and to dilute and distribute these drugs after their importation. The principal government witness, Edward Lawton Smith, and other government witnesses, described in some detail the workings of the conspiracy and the functional division of labor within the organization. In skeleton outline the conspiracy consisted of a group of Canadians, headed by Giuseppe "Pepe" Cotroni, who handled the exportation of the drugs from

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1 Count four named Orlandino, Struzzieri and Monas[illegible]; count five named Monastersky, Bentvena and Struzzieri. Orlandino pleaded guilty at the beginning of the first trial. All appellants were named in count eight.

2 The following sentences were imposed: Bentvena—15 years on counts 5 and 8; Dipietro—20 years; Fernandez—35 years; Galante—20 years and $20,000; Loicano—20 years; Mancino—20 years; Mirra—20 years; Monastersky—30 years on counts 4, 5 and 8; Ormento—40 years and $20,000; Carmine Panico—12 years; Salvatore Panico—20 years; Scremammano—12 years; Struzzieri—12 years on counts 4, 5 and 8. The sentences imposed on multiple counts are to run concurrently. Fernandez, Monastersky, and Ormento were sentenced as multiple offenders pursuant to 26 U. S. C. § 7237(c).

Canada. Couriers brought the narcotics across the Canadian-United States border and into the New York metropolitan area. Members of the conspiracy manned centers in the New York metropolitan area where they received the drugs from the couriers and diluted and packaged them. Distributors finally disposed of the drugs through various selling outlets. Overall responsibility for the continuing operation rested in its "chief executive", the appellant Carmine Galante.

THE CONSPIRACY

The April 1957 Montreal Meeting and Narcotics Importation

In late April 1957, Smith, a Canadian with underworld connections, met the appellant Mancino in Montreal. Mancino asked Smith to make a "run" into New York with him and Smith agreed. The following day Mancino took Smith to an apartment in Montreal where they met the appellant Galante, the severed defendants Giglio and Stepanoff, and Frank Cotroni, Vic Cotroni, and a person identified only as "Angelo". Galante picked up a valise, put it on the coffee table, and opened it. Mancino examined its contents, which were clear plastic bags containing a white powder. As Smith and Mancino were leaving with the valise, they encountered the severed defendants, Guiseppe "Pepe" Cotroni and Vecchio. Smith and Mancino drove to New York to Frank's Bar & Grill in Brooklyn where Mancino took the valise of narcotics and Smith returned to Montreal.

In late February or early March, 1958, Smith again came into New York City and drove to Frank's Bar & Grill where he met Mancino, Vecchio, and "Angelo". Mancino asked Smith if he would drive over to Manhattan and back. Smith agreed and Mancino picked up a package from Vecchio's car and directed Smith to the Vivere, a bar located on the lower east side. There Mancino left the car, rejoined Smith shortly, and they drove back to Brooklyn.

The "Route" Deliveries

During the ensuing months, Smith spoke with Mancino almost daily and there followed at weekly intervals a series of at least five "route" deliveries of narcotics throughout the Metropolitan area. On each of these occasions Smith met Mancino, Vecchio and "Angelo" at Frank's Bar & Grill in Brooklyn. Vecchio would remove a cardboard suitbox from the trunk of his car and give it to Mancino who would take it upstairs to his apartment and return in a few minutes carrying a valise. Prior to one "route" delivery, Smith accompanied Mancino to the latter's apartment with a suitbox and saw the nature of its contents, cellophane bags containing white powder. On this occasion, Smith saw Mancino wrap each of the bags in brown wrapping paper and mark them with the names of the "drops" along the route. Mancino then put the packages in a valise and an empty shoebox and he and Smith embarked on their route.

The first stop on the route was the Vivere. After the first delivery to the Vivere, Smith accompanied Mancino into the bar, where he observed Mancino put the valise on the table, take out a package and give it to DiPietro, who in turn gave it to the severed defendant Gellman.

The second stop on the run was the Squeez-Inn, a bar on East 4th Street in Manhattan. On at least three occasions, the package was given to appellant Sciremammano who carried it to the back of the bar. Another time the shoebox containing the narcotics was given to the defendant Polizanno[3] in the presence of the severed Canadian defendant Stepanoff.

The fourth stop[4] was the 1717 Club, a bar in Brooklyn operated by appellants Salvatore and Carmine Panico. There the package would be delivered to one of the brothers, both of whom would take it to the kitchen in the back of the bar.

After the stop at the 1717 Club, Smith would return with Mancino to Frank's Bar & Grill, where Smith would remain while Mancino made a delivery to "Rocco up on the Hill". Mancino later introduced the severed defendant Sancinella to Smith as "Rocco up on the Hill", and the appellant Angelo Loicano as "his partner, Puggy". In Loicano's presence, Sancinella asked Smith to make some runs from Canada for them. When Smith declined this offer, Loicano told him that he could make $100,000

3 Polizanno was severed between the first and second trials.

4 The third stop was a hotel in Coney Island. None of the persons there involved are defendants in this indictment.

to $140,000 a year in this work and that Smith should think it over.

In addition to these regular stops on the route, on three occasions Smith drove Mancino to a Manhattan hotel where packages were given to the severed defendant Indiviglio.

DiPietro and Mancino meet Cotroni in Canada

Because of a dispute over DiPietro's failure to make prompt payment in full to the Canadian group, DiPietro, late in April 1958, invited Smith to accompany him on a trip to Canada. A day or two later, Smith, DiPietro, Mancino, "Angelo," and one Frank Randazzo drove to Canada. In Montreal, Smith arranged a meeting between Cotroni, Giglio and DiPietro. After DiPietro paid Cotroni $17,000, Giglio informed DiPietro that he was now on a "pay as you go basis." On the following evening, Mancino, Randazzo, "Angelo" and Smith drove back to New York City with a load of narcotics and Smith and Mancino made deliveries to the Vivere, the Squeez-Inn, the hotel in Coney Island, and the 1717 Club.

The Ormento Group

Between May 16 and May 21, 1958, at the Vivere, DiPietro introduced Smith to appellant Anthony Mirra. On the following evening at Mirra's request, Smith went to Johnny's Keyboard, a bar on Lexington Avenue between 56th and 57th Streets and there met Mirra, the severed defendant Petillo, and appellant Joseph Fernandez. During

the next few days, the four of them spent a great deal of time together. In late May 1958, Smith and Petillo drove to the lower east side to Jay's Bar on Houston Street, where Petillo introduced Smith to three men—"Angie", "Bootsie" and "Chalutz"—the severed defendants Angelo Tumminaro, Anthony DiPasqua and Charles Gagliadatto, respectively. During the meeting, "Angie" asked Smith to make "runs" from Canada for them and when Smith declined "Angie" guaranteed that he would make $140,000 a year in this line.

A few days later, Mirra and Smith went to a restaurant, Marino's, where they met appellant John Ormento, who also asked why Smith was turning down "these offers we have been making to you." In the early part of June, Smith again went to Jay's Bar with Petillo, where they met "Bootsie," "Angie" and "Chalutz." "Angie" again pressed him to make runs from Canada and when refused asked him about the trip he had made to Canada with DiPietro, and asked whether he had brought back a "load." When Smith agreed that he had done so, "Angie" said, "Who the hell do you think that was for?" As Smith and Petillo started to leave, Petillo picked up an envelope which he said "was his end" that he received every week.

A short time later, Mirra told Smith to go to Chickie James' Stable, a midtown night club operated by Mirra. There he was joined by Mirra and Fernandez. Mirra and Fernandez went to the rear of Fernandez's car where Fernandez took out an attache case which he gave to Mirra. Smith drove Mirra to the Saxony Restaurant on East 53rd Street. As Mirra was getting out of the car, Smith asked

what this was all about and Mirra opened the attache case revealing two cellophane bags containing a white powder, and said they were "making a run." When Mirra returned, he again opened up the case and showed Smith the contents, two bundles of money. They returned to the Stable where they met Fernandez and Petillo. Mirra gave the attache case to Petillo, who left the area in a taxicab.

During the second week in June, 1958, Smith and Mirra made a delivery of narcotics to Marconi's Restaurant at Ormento's behest. Sometime during the middle of June, Smith, Mirra, Petillo and Fernandez met in the basement of Chickie James' Stable and discussed the possibility of opening a new wholesale narcotics outlet. They concluded that with Smith's Canadian connection for narcotics, they could establish themselves and parted with the understanding that when all was set they would let Smith know. About a week later, Smith met with "Bootsie", "Angie", "Chalutz" and Petillo at Jay's Bar and was again urged to make trips to Canada for them.

Delivery from Galante to Ormento

Late in June 1958, Mirra, Smith and one Joseph Curtis drove to 56th Street and Sutton Place in Manhattan where Galante was standing on a corner. When they approached, Galante told Mirra that the "stuff" was in a nearby car. Mirra and Smith removed a suitcase from the rear of the car and Mirra gave it to Curtis, who put it in his car. Galante asked Mirra if he knew what to do, Mirra indicated that he did, and Galante gave Smith ten $100 bills. Mirra,

Smith and Curtis then drove to the Park Sheraton Hotel, where Smith and Mirra went upstairs. In one of the rooms they met Ormento and Vinnie Bruno, not a defendant in this case. Mirra threw the suitcase on the bed and Ormento opened it, revealing a number of cellophane bags with white powder.

On the 28th or 29th of June, Mirra, Petillo and Smith were arrested by local authorities. Upon their release, Smith was criticized by Mirra for not changing hotels and when Smith remained adamant, Mirra told him to make a change or he'd wind up behind a truck, because "if Carmine [Galante] gives the order, John [Ormento] will have to carry it out, and you are going to wind up being dragged behind the truck."

Seizures of Heroin and Other Evidence

On February 14, 1959, Narcotics Agents observed Marcantonio Orlandino drive to the residence of his brother and sister-in-law, Ana and Philip Orlandino. He entered the house and came out carrying a brown paper bag and drove to his place of employment in Jamaica. Shortly after noon he drove to the Railway Express Office in Jamaica and presented a parcel for shipment to "Eula I. Brown in Chicago", giving his name as Smith. The package arrived in Chicago, and on February 18 it was seized by agents of the Bureau of Narcotics. It contained approximately two kilograms of heroin.

Again on February 14, 1959, Narcotics Agents, together with local police, entered the residence of Ann and Philip

Orlandino and found approximately seventeen pounds of heroin, over $49,000 in cash, and paraphernalia utilized in the diluting, packaging and distribution of drugs. At the same time, other agents seized two packages which contained approximately a half kilogram of heroin from the desk used by Marcantonio Orlandino at his place of employment. Further out on Long Island, at the same time, other agents entered the residence of Marcantonio Orlandino and seized, *inter alia*, an address book in which appeared the inscription: "Ang Tumanaro 95-24 148 St. Ca 6-7518 Jamaica OL 7-5476".

In April 1959 other law enforcement officers were closing in on the center of the Vivere Lounge operated by DiPietro and Gellman. On April 27, Narcotics Agents followed Gellman to 19th Street and Second Avenue where he met DiPietro in a luncheonette. While there an agent overheard their conversation concerning an imminent sale of narcotics. DiPietro instructed Gellman to meet him "in front of the plant in exactly ten minutes." The agent followed Gellman to 226 East 18th Street where Gellman entered the building. When he came out he was carrying a brown paper bag which he gave to DiPietro who was waiting in front of the building. They parted and DiPietro entered a car which was parked across the street from the luncheonette, and drove away. They met again in a short time later and DiPietro was seen to hand Gellman some money.

On April 30 Gellman again entered the "plant" and emerged carrying a brown paper bag. He was apprehended by federal and state officers. The bag he was

carrying contained a quantity of heroin. A search of the apartment at 226 East 18th Street, which was used as the plant, uncovered a suitcase containing a quantity of heroin, packaging paraphernalia, and some empty plastic bags with traces of heroin.

Agent Biase and Smith as "Importers" and "Retailers"

In the middle of April 1959 Smith started to cooperate with the Bureau of Narcotics and, shortly thereafter, he introduced an undercover agent of the Bureau, Patrick Biase, to Mancino in an attempt to infiltrate the conspiracy. The Agent and Mancino discussed the possibility of Smith's and the Agent's opening a new wholesale outlet for narcotics, securing narcotics from the Cotroni organization in Canada. On April 27 Biase and Smith met Mancino and were told by Mancino that he had not yet gotten the "connection" they sought to take care of supplying them with drugs during a shortage between Canadian trips but said that he would see "Rocco" (Sancinella) about it. They parted with the understanding that Smith and the Agent would contact him upon their return from Canada.

Smith and Biasé went to Canada and, on April 29, met "Pepe" Cotroni and the severed defendant Rene Robert. Smith told them that he and Biase were going to open a new wholesale outlet and wanted their aid. Cotroni gave them detailed instructions on the methods used to smuggle the narcotics across the Canadian-United

States border. He also asked Smith how "Angie" and "Bootsie" were. He told Smith that the narcotics seized from the Orlandinos belonged to "Bootsie" and "Angelo".

On May 21 Biase and Smith returned to Montreal and were reminded by Cotroni that it was his "stuff" that had been seized—"the ten kilos in Hicksville from Orlandino." He told them that "Angie" and "Bootsie" still owed him a substantial amount of money for the narcotics seized from Orlandino, but that he was not concerned since he could trust them. They remained in Montreal and on May 25 Cotroni told Biase and Smith that he had gotten a phone call from the people in New York and that "Angie" and "Bootsie" were not anxious for new competition. They agreed to avoid this problem by telling Mancino that they had a new connection for drugs in Florida. After arranging to communicate with Cotroni by telephone, Smith and Biase returned to New York where they met Mancino and, according to their plan with Cotroni, told him they were going to get the narcotics from a Florida connection.

On June 2, 1959, Biase and Smith returned to Montreal and met Cotroni and Robert. Biase gave Cotroni $13,800 for narcotics. Cotroni gave the money to Robert, who left the motel room, returning a short while later with two kilograms of heroin. Biase and Smith turned the narcotics over to agents of the Bureau of Narcotics and the Royal Canadian Mounted Police.

After several telephone calls from Cotroni, Smith and Biase returned to Montreal on June 17. Once again Cotroni and Robert met them at their motel and Biase gave $14,000 to Cotroni who promised delivery of the drugs later that

evening. In the early hours of June 18, while Cotroni, Biase and Smith were in the motel room, Robert entered carrying a cardboard box and a brown zipper bag which Biase had furnished. They contained approximately four kilograms of heroin. Cotroni opened the cardboard box and took out one of the plastic bags containing heroin, and indicated to Biase and Smith a point on the bag which had been punctured and then sealed with scotch tape. He told how this mark was made by him in his particular testing procedure and that it was a trademark, attesting that Cotroni himself had tested the narcotics and had found them to meet his high standards of purity. Cotroni said, "when you see that 'X' on the tape there, you'll know that the stuff belongs to me." After separating, Biase and Smith again turned the narcotics over to agents of the Bureau of Narcotics and the Royal Canadian Mounted Police.

A week later on June 24 Cotroni came to New York City with Robert and met Smith at the Edison Hotel. Smith introduced another undercover agent, Frank Dolce, as the "money man" of their business. After the meeting, Dolce and Smith drove Cotroni to the Vivere to find DiPietro. He was not there and Cotroni asked them to drop him at Mancino's residence in Brooklyn. The next day Smith and Dolce again met Cotroni and Dolce paid him part of some money due him for narcotics. Cotroni later told Smith that he wanted him "to bring back 12 kilos for Boots and Angie." On June 30 in Montreal Robert again advised Smith that Cotroni intended to utilize him to bring drugs back to New York City for the people there. On July 7, Biase and Smith met Cotroni and Robert to arrange

for a purchase. While driving around Montreal, Cotroni told them that he had six kilograms for them, and, if everything was all right, they would also take another fifteen kilograms to New York for Tumminaro and DiPasqua. Thereafter, difficulties in consummating the transaction arose and officers of the Royal Canadian Mounted Police placed Cotroni and Robert under arrest.

Sometime during July or August, 1959, shortly after Cotroni's arrest, Mirra and Indiviglio, accompanied by another man, arrived at the Montreal residence of Suzanne Cadieux, Rene Robert's mistress. They sought the "cache" of drugs Cotroni had at the time he was arrested. After threatening Mlle. Cadieux to no avail, they departed without finding the narcotics.

Sufficiency of Proof as to the Conspiracy.

There was abundant evidence that all appellants, except Bentvena, Monastersky and Struzzieri, were part of a conspiracy to import and deliver narcotic drugs. The evidence of knowing participation in the conspiracy by Galante, Mancino, DiPietro and Mirra is overwhelming. The testimony of Smith not only placed Galante in the midst of the group importing the drugs but also shows him with physical possession of narcotics and direct knowledge and supervision of the importation. Smith's and Agent Biase's testimony establishes Mancino as a courier for the organization who smuggled the drugs into the United States and, with Smith, distributed the drugs on periodic "route" deliveries to wholesale centers in the New York metro-

politan area. DiPietro was described as the head of the center that operated from the Vivere. There was extensive testimony relating to DiPietro's trip to Montreal and the settlement of his financial difficulties with Cotroni. Smith's testimony concerning DiPietro was corroborated by substantial independent evidence. It was DiPietro who introduced Smith to Mirra. Mirra was a member of the group operating under Ormento in the east midtown area and was responsible for the physical handling of the narcotics for this group. Smith's testimony showed Mirra delivering narcotics from Galante to Ormento whom Mirra described as his "boss." Smith accompanied Mirra on a number of narcotics deliveries. Mirra's position in the organization was corroborated by the testimony of Cadieux.

Ormento contends that he was involved in "but two isolated transactions" with "no evidence of any narcotics or indeed of any possession of narcotics." However, on the occasion of the delivery of narcotics by Mirra to Ormento at the Park Sheraton Hotel, Mirra threw the suitcase on the bed and Ormento opened it, revealing a number of cellophane bags containing white powder. Galante had previously characterized the contents of the suitcase as "stuff." That the substance involved in this transaction was narcotics may, of course, be proved by circumstantial evidence. The evidence establishing the nature of the contents of the packages here involved was in all respects similar to that approved by this court in *United States* v. *Aguegi*, 310 F. 2d 817 (2d Cir. 1962). See, also, *United States* v. *Morello*, 250 F. 2d 631 (2d Cir. 1957); *Toliver* v. *United States*, 224 F. 2d 742 (9th Cir. 1955). Ormento is

in no position to invoke the isolated transaction rule. Aside from the evidence of Ormento's direct participation in this and the other narcotics transaction referred to previously, his statements to Smith concerning the latter's refusal to accept the several offers made to him clearly support an inference of knowledge of the existence of a vast organization dealing in Canadian narcotics.

Fernandez and Loiacano similarly argue that the evidence against them is insufficient to establish knowing participation in a vast conspiracy and, at best, shows an isolated transaction. The isolated transaction rule

> "is not an arbitrary rule which is to be applied rigidly and without reason. It has been utilized to exonerate a defendant only when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred." *United States v. Agueci, supra*, at 836.

The evidence against Fernandez consisted first of his taking an attache case from his car and giving it to Mirra who delivered it to the Saxony Restaurant. This attache case contained two cellophane bags filled with white powder. Smith also testified that Fernandez had summoned Mirra and Petillo to a meeting called by Galante at Johnny's Keyboard. Finally, Smith testified that Fernandez took part in a discussion with Mirra, Petillo, and Smith concerning the importation and distribution of Canadian narcotics. At this meeting, Smith was asked if he had a strong connection with "Pepe" Cotroni and if he could get narcotics

from him. When Smith replied affirmatively, Petillo indicated that the other three could get the money that was needed and that they could open a new wholesale narcotics outlet.

A single act may be enough to draw a defendant within the ambit of a conspiracy, *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir. 1959), cert. denied, 362 U. S. 974 (1960); *United States* v. *Carminati*, 247 F. 2d 640 (2d Cir.), cert. denied, 355 U. S. 883 (1957). Since, however, the crime of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent or the government must submit independent evidence that the defendant knew of the conspiracy and associated himself with it. *United States* v. *Aviles*, *supra*; *United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch*, 113 F. 2d 982 (2d Cir. 1940). We find here, as we did in *United States* v. *Agueci*, *supra*, that there was independent evidence from which Fernandez' knowledge of, and desire to participate in, the overall conspiracy may be inferred. The conference at which the opening of a new wholesale outlet being supplied from Canada was discussed demonstrates Fernandez' knowledge of the existing conspiracy and his desire to participate in a new phase of that conspiracy. Appellant's contention that this discussion related to the formation of a new conspiracy and not a new participation in the old is not well founded. A conspiracy, once established, is presumed to continue until the contrary is demonstrated, *United States* v. *Stromberg*, 268 F. 2d 256 (2d Cir.), cert. denied, 361 U. S. 863 (1955),

and cases cited therein. Further, a conspiracy of this kind is, by its very nature, constantly expanding. The outlet contemplated at this meeting would have become just one more "drop" in the scheme of distribution. In any event, the contemplated formation of a new outlet presupposes the existence of old ones and is sufficiently probative of Fernandez's knowledge of the overall conspiracy to warrant a conviction for conspiracy. As we said in *United States* v. *Aviles*, *supra*, at 190:

> "From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it."

Loicano was introduced to Smith as a "partner" of "Rocco, up on the hill" (Sancinella) in Sancinella's presence. At this meeting at a bar in Brooklyn, Sancinella asked Smith if he would be willing to "make some runs back and forth to Canada for him and his partner Puggy (Loicano)." When Smith declined the offer, it was Loicano who suggested that he could make $100,000 to $140,000 a year as a courier and told Smith to think it over. Smith testified that a number of deliveries were made to Sancinella. Loicano contends that the conversation with Smith was not in furtherance of the conspiracy charged but was an attempt to form a new conspiracy. We disagree. Sancinella and Loicano were engaged in an effort to recruit Smith as a courier to carry narcotics from Canada. They sought to have him join the existing conspiracy as an integral part of it and not to go into competition with the old conspiracy. This is made abundantly clear by Mancino's efforts on behalf of Sancinella and Loicano to employ Smith.

Mancino was the strong thread running through this entire conspiracy. This evidence against Loicano demonstrates the requisite knowledge of the conspiracy and a transaction with its members from which it would be reasonable to infer an intent to participate in it.

Carmine and Salvatore Panico and Sciremammano also contend that there is insufficient evidence to establish their knowing participation in the conspiracy. The evidence showed that these three appellants were repeated recipients of packages on Mancino's route deliveries. While no conversations with Sciremammano illuminate his actions in repeatedly receiving packages of narcotics from Mancino and taking them to the back of the bar, this receipt of a quantity of narcotics repeated at least three times, is sufficient evidence from which a jury might reasonably conclude that the participant was aware of the existence of a larger scheme.

Like Sciremammano, the Panicos were recipients of packages of drugs at their "place of business," the 1717 Club, but unlike Sciremammano, their activities were amplified by conversations, as well as evidence of acts which clarify their knowledge of the conspiracy. Smith testified that Salvatoré Panico was waiting on the sidewalk for Mancino and Smith on a number of occasions that packages of narcotics were delivered to the 1717 Club. From this evidence it might be inferred that he was there by prearrangement, with knowledge of the existence of a larger scheme in which he was participating. His actions in removing one of the packages from the valise in Smith's car on one delivery, and his admonition not to argue while

they had "stuff" supports the inference. Carmine Panico participated in the receipt of the package from Mancino on each occasion and accompanied his brother into the kitchen with it. In addition, he told Smith and Mancino to do their "arguing some other place, some other time, not when you're making a run." The evidence as to his own independent actions and statements fully supports the jury's conclusion that he knowingly participated in the overall scheme.

THE ERRORS ASSERTED

There remain for consideration those claims of error which affect all of several of the appellants.

I

A. *The Atmosphere of the Trial.*

All appellants complain that the atmosphere of the trial below rendered impossible that objective and unprejudiced hearing to which they were entitled. Specifically, they contend that the "mass conspiracy" trial, the outbursts and conduct of some defendants, the comments and actions of the trial judge, and the publicity attending the trial denied them the fundamental fairness required by due process. To appreciate fully the nature of these contentions, and to put the incidents referred to in their proper setting, we must start with the first trial and its abortive ending.

The first trial of this indictment began on November 21, 1960, after a number of delays, including a one-week postponement occasioned by the flight of the defendant Tuminaro on the eve of trial. It proceeded along its rocky road for six months over every conceivable type of obstruction and interruption. On May 15, 1961, the eve of summations, it ground to a halt after the foreman of the jury broke his back in an unexplained fall down a flight of stairs in an abandoned building in the middle of the night. No alternate jurors (four had been originally empanelled) remained and a mistrial was declared. As this court has already had occasion to consider the misadventures in the first trial and the misconduct of the defendants which resulted in their remand and in contempt actions against some of them, they will not be fully catalogued here.[5]

At the conclusion of the first trial, the defendants were enlarged on bail and, with the court's permission, various attorneys from the first trial were discharged from their representations. The case appeared at regular monthly intervals on the trial calendar beginning June 19, 1961. On each occasion it was adjourned because a number of the defendants said that they had been unable to retain counsel notwithstanding their ability to raise substantial bail. As early as July 31, 1961, Judge Murphy sensed "that the failure to retain counsel was part of a plan to postpone trial." Despite efforts of the court and threats of contempt proceedings, it was not until March,

5 *See United States* v. *Bentvena*, 288 F. 2d 442 (2d Cir.), aff'd *sub nom. Fernández* v. *United States*, 81 Sup. Ct. 642, 5 L. Ed. 2d 683 (1961); *United States* v. *Galante*, 298 F. 2d 72 (2d Cir. 1962).

9, 1962, that all defendants who had not been severed on the government's motion had counsel, either retained or appointed by the court. After further delays and substitutions of counsel (to be treated more fully below), the trial began on April 2.

During the polling of jurors on this opening day of trial, the first outburst by Salvatore Panico occurred. This incident was a precursor of events to come. Similar outbursts by Panico and other defendants[6] became commonplace. On one occasion Panico climbed into the jury box, walked along the inside of the rail from one end of the box to the other, pushing the jurors in the front row and screaming vilifications at them; the judge, and the other defendants. On another occasion, while the defendant Mirra was being cross-examined by the Assistant United States Attorney, Mirra picked up the witness chair and hurled it at the Assistant. The chair narrowly missed its target but struck the jury box and shattered. The trial judge responded to these outbursts by having the perpetrators gagged and shackled. We have described only two of the more dramatic disturbances which plagued the trial of this case for we find it neither necessary nor judicious to publicize or preserve the vile language and rebellious conduct that characterized this trial. Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive.

In addition to the courtroom conduct of the defendants, they engaged in a series of off-stage activities designed

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6 Eleven defendants were punished for contempt for their behavior during trial.

to delay and prolong the trial.[7] On April 16, the defendant Sciremammano fell or tripped down two stairs at the Federal Detention Headquarters. Because of this, no testimony was taken on April 16 or on the morning of the 17th in order to permit a physician to examine Sciremammano, first in the Courthouse, and then in a hospital. No objective signs of injury were found. The physician stated that in his opinion Sciremammano was feigning his "agony". Nonetheless, he refused to come to court and, when brought in a wheelchair, insisted that he was too sick to continue. No testimony was taken on the afternoon of April 18 because of the illness of the defendant Struzzieri. Mirra and Salvatore Panico, on one occasion, claimed that they had been drugged and were unable to remember what had transpired in the courtroom. In the early hours of June 7 Salvatore Panico was found by a correction officer at Detention Headquarters hanging by a belt in a cell which he occupied with his brother and another prisoner. Thus, the opening of court was delayed. Panico was unharmed and was able to continue the trial later that day. A court-appointed psychiatrist noted with reference to this incident, "the ostensible attempt at self-hanging occurred under circumstances justifying suspicion" as to its genuineness. The following morning, in the shower room, while preparing to come to court, and with his brother and other prisoners in the room, Salvatore Panico made 14 widely-spaced shallow cuts on his forearm between the elbow and wrist. Panico's wounds were sutured with

7 The first trial was bedeviled by similar "illnesses" of the defendants. See *United States* v. *Bentvena*, *supra*, at 445-46.

little loss of blood. On Monday, June 11, Monastersky's attorney informed the court that his client had fallen in the shower and had injured his arm. As with the others above-mentioned, it was asserted that Monastersky was so affected by the medication he received (an aspirin-like compound) that he was groggy and unable to follow the proceedings. Monastersky's symptoms are claimed to have persisted during the remainder of the week.

All appellants, even the perpetrators, complain of the prejudicial effect of the outbursts of the defendants. They claim that this prejudice was accentuated by the nature of the trial itself, that is, a mass conspiracy trial in which fourteen defendants were tried together. They contend that the rulings of the trial judge, in failing to declare a mistrial or sever the unruly defendants, and in ordering some of the defendants gagged and shackled and ordering an increased number of marshals to be present in the courtroom, constituted reversible error. We find no abuse of discretion in the trial judge's actions taken to preserve the security of the courtroom. If any one distinct impression is gained from a scrutiny of the record here, it is that the trial judge was justified, indeed was forced, to resort to stern measures to obtain order in his courtroom.

As to his failure to sever certain defendants and to declare a mistrial after these outbursts, we look to our recent decision in *United States* v. *Aviles, supra.* There, as here, a defendant burst into a triade before the jury accusing his co-defendants. There, as here, the trial judge promptly instructed the jury to disregard the outbursts. We said, in answer to the contention that reversal was required:

"Manifestly, it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper." *Id.* at 193.

This case differs from *Aviles* only in that the outbursts of the defendants were more numerous and more offensive. But the trial judge instructed the jury to ignore the outbursts each time they occurred. This is all that he could do apart from taking steps to prevent their repetition. We have satisfied ourselves that the prosecution did not provoke the incidents. The judge did all in his power to minimize their effect, and we find no ground for reversal in the circumstances. Any other answer to these contentions would produce little less than anarchy.

Appellants also seize upon the concern expressed in our recent decision of *United States* v. *Agueci*, *supra*, over the problems inherent in the trial of a mass conspiracy case. Their claim, apparently, is that if this were not a multi-defendant trial, the prejudice engendered by one defendant's outburst could not accrue to the detriment of other defendants for the simple reason that they would not be there. In addition, they assert that if only two or three defendants were on trial, the chance that these disturbances would occur would be lessened.

Law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice in the federal courts will not be delivered into the hands of those who could gain only from its subversion. Our decision in *Aviles* is as applicable to a trial of two defendants as it is to a trial of fourteen. It may take two to conspire but it takes only one to throw a chair at a prosecutor.

Appellants claim that the trial judge should have severed each offending defendant after an outburst. Why this course of action was required we fail to see. After the incident had occurred, severance would not have protected the remaining defendants from any possible prejudice. It would simply have afforded each defendant an easy escape from the trial. Appellants insist, however, that Salvatore Panico should have been severed because even if he were competent to stand trial, he was so mentally ill during the trial that his continued presence and conduct prejudiced the rights of the other defendants to a fair trial. Their claim is that even if prejudice resulting from the outbursts could not have been erased, the judge was obligated to sever Salvatore Panico after it became apparent that he could not control himself and that other outbursts would be forthcoming.

Rule 14 of the Federal Rules of Criminal Procedure[8] provides for an exercise of discretion by the trial judge as

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8 "Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

to whether, at any point in the trial, there appears to be a possibility of sufficient prejudice to any defendant to warrant a severance, *United States* v. *Schaffer*, 362 U. S. 511 (1959); *Opper* v. *United States*, 348 U. S. 84 (1954); and the exercise of this discretion will be corrected only if abused. *Dowling* v. *United States*, 249 F. 2d 746 (5th Cir. 1957); *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir. 1943). We have recently had before us the contention that Salvatore Panico could not be punished for contempt because he "was too mentally ill to formulate the intent to be contumacious." *United States* v. *Panico*, 308 F. 2d 125 (2d Cir. 1962). We there quoted at length from the trial judge's certificate filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure and concluded as follows:

> "We do not think that the conclusion of Judge MacMahon with respect to the deliberate and calculated nature of defendant's acts constituted reversible error." *Id.* at 127.

Accepting that conclusion here, little remains of appellants' claims that the trial judge abused his discretion in failing to sever Panico. The trial judge found, from his own extensive observation of Panico, and from the reports of psychiatrists that examined him, that Panico's acts were deliberate and calculated to disrupt the trial. This being so, he stands in no different position than the other unruly defendants and, as we have said, there was no abuse of discretion in refusing to grant a severance because of their actions.

All appellants also contend that the trial judge's attitude towards the defendants and their counsel, as revealed by his comments and rulings, prejudiced the jury against them. To support these claims, appellants direct our attention to isolated incidents, invariably taken out of context, and ask us to conclude therefrom that the trial judge abandoned his proper sense of impartiality and placed the weight of his position on the side of the prosecution.

The trial judge, in his attempt to bring this case to trial and to see it brought to an orderly and expeditious conclusion, was presented with a host of problems calling for the exercise of his discretion. Having the experience of the first trial before him, he had to make certain that the trial proceeded with reasonable dispatch and, at the same time, guarantee that all steps be taken to safeguard the rights of the defendants. In view of the unprecedented tactics employed to impede the continuance and resolution of this trial, we find that the actions and rulings of the trial judge were reasonable and often necessary to prevent the frustration of justice.

Appellants strenuously urge upon us two incidents in particular that are alleged to typify the trial judge's attitude. The first concerns the identification of Struzzieri by a government agent.[9] When the Agent was asked to do so by the prosecutor on direct examination, he identified Struzzieri as the one "with the gray suit, he has a black tie on." Struzzieri, in fact, had a gray suit and white tie on. When defense counsel called attention to this fact, the judge had

[9] This incident has been considered by this court once before. See *United States* v. *DiPietro*, 302 F. 2d 612 (2d Cir. 1962).

the witness step down and touch the defendant he identified as Struzzieri. He identified the right man. Defense counsel then asked the judge to put a description of the clothing worn by Struzzieri in the record. The judge responded:

> "The Court has already indicated what happened. I will simply say that Struzzieri does not have on a black tie. He does have on a dark gray suit. I also say for the record that there was no doubt in the Court's mind who was identified. It will be for the jury to decide, however."

Appellants contend that this was an unwarranted intrusion by the trial judge into the province of the jury and that it exemplified the judge's partial attitude. The facts do not justify appellants' conclusion.

At a pretrial conference, the trial judge asked defense counsel to devise a seating arrangement for themselves and for the defendants and he informed them that he would agree to anything reasonable. Defense counsel asked to be able to shift the defendants around as they saw fit. The trial judge refused this request on the ground that it would create disorder but agreed to an arrangement whereby the defendants would sit behind their respective counsel. Some time just before the incident in question, DiPietro left the seat he ordinarily occupied and took a seat immediately to Struzzieri's left. DiPietro was dressed in a light gray suit and wore a black necktie. The shades of Struzzieri's dress were just the opposite: he wore a dark gray suit and a white tie. Up to this point in the trial, each time a witness was asked to identify a defendant, that defendant stood up, either at the direction of his counsel or without being asked,

before the identification took place. The witness involved in this incident was asked to identify both Bentvena and Struzzieri. Bentvena stood up and the witness identified him; Struzzieri stood up and the witness identified him but remarked that he had a black tie on. Defense counsel, who had their backs to both DiPietro and Struzzieri, wheeled around and asserted that the witness had identified DiPietro. The trial judge concluded that the defendants had engaged in a pre-arranged attempt either to confuse the witness or mislead the jury. On the basis of the facts of record set out above, and our own detachment from the atmosphere of these proceedings, we can neither say that he was wrong in his conclusions nor that his statements made in the presence of the jury were improper.

The second incident concerns the trial judge's characterization, in the presence of the jury, of certain outbursts by defendants as "a put-up job." On the morning of May 25, 1961 shortly after the first witness of the day had assumed the stand, the following occurred:

> Defendant Salvatore Panico: DiPietro is talking about me there. He is the convicted dope pusher. Separate me from him."
>
> Defendant DiPietro: "Stop him. I told you, Al."
>
> Mr. Kreiger: "I move for a mistrial as far as DiPietro is concerned."
>
> (Deputy marshals escort Salvatore Panico from the courtroom.)
>
> . . . .
>
> The Court: "Your motion for a mistrial is denied, Mr. Krieger. It is obviously a put-up job."

It should not be the function of an appellate court with all the advantages of hindsight to substitute itself for the trial judge and to declare how it might have handled each situation or to deliver lengthy admonitions to trial judges on the proprieties of conducting these difficult criminal trials and the need to avoid embroilment with defendants and defense counsel despite the kind of provocation evident here. This was but one incident in a trial that lasted almost three months. It was not, as appellants contend, an indication of the hostility of the trial judge toward the defendants and their counsel. We have described sufficiently the outrageous conduct of the defendants at this trial. We find that the trial judge, notwithstanding this harassment, maintained an impartial attitude and did all in his power to safeguard the rights of the defendants and to minimize the effects of these outbursts. After the incident in question, as after all similar disturbances, the judge instructed the jury to ignore it. We find no ground for resersal here.

B. *Newspaper Publicity*

During the course of the trial, certain articles appeared in the New York newspapers specifically referring to the trial and some of the defendants. These articles called attention to the reason for the declaration of a mistrial in the first trial and described some of the defendants as "delegates to the 1957 underworld convention in Apalachin" and as linked to "the Mafia." Upon being advised of the contents of these articles, the trial judge conducted a number of "*voir dires*" of the jury. No juror had read any

of the articles. One juror indicated that his wife, in an effort to find out what case he was sitting on, showed him two newspaper articles. He glanced at one long enough to realize that it was about this case and then put it aside and refused to discuss it further with her. He gave every assurance that the article had not prejudiced him. The judge, nevertheless, discharged him from the jury.

After each *voir dire* and before each day's recess, with one exception, the judge cautioned the jurors against reading anything that related to this trial or to narcotics generally and to refrain from discussing the case with anyone. In addition, the trial judge had the United States Attorney write to all New York publishers requesting that they avoid publishing articles related to the case. This request was complied with until the misconduct of the defendants reached such violent and bizarre extremes that the voluntary ban was lifted by the press. Even then, only one article appeared that discussed the happenings of the trial. It is evident from the record here that the trial judge was extremely sensitive to the problems raised by adverse newspaper publicity.[10] He took every precaution possible to prevent the publication of prejudicial articles and repeatedly admonished the jury to avoid contact with any such publicity.

"The crux of the matter is whether the statements were so prejudicial as to require the trial judge, who has large discretion in such matters, * * * to empanel a new jury."

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10 The transcripts of all hearings relating to newspaper publicity were ordered sealed by the trial judge to safeguard further the rights of the defendants.

United States v. *Feldman*, 299 F. 2d 914, 917 (2d Cir. 1962). Here there was no showing that any juror came into contact with such matter, nor was there, of course, any showing that a juror could not serve in a fair and impartial manner. That, coupled with the affirmative action taken by the Government and the trial court's continuing efforts to secure a fair and impartial jury, clearly compel the conclusion that appellants suffered no prejudice. *United States* v. *Aquèci*, *supra*; *United States* v. *Leviton*, 193 F. 2d 848 (2d Cir. 1951), cert. denied, 343 U. S. 946 (1952).

C. *Denial of Right to Counsel—Adequacy of Time to Prepare for Trial.*

A number of appellants contend that they were denied the effective assistance of counsel by the trial judge's refusal to postpone commencement of the trial so that defense counsel could adequately prepare. At a pretrial conference held on March 9, 1962, the trial judge set the case for trial on March 19th. One of the assigned counsel had been appointed as recently as March 2nd. In rejecting applications for adjournment, the trial judge explained that the case had been tried once before, that they were in the advantageous position of having the Government's case set out in the record, and that the facts of the case could easily be mastered by the date set for trial. On March 16th at another pretrial conference, the trial court relieved Mancino's counsel of his assignment because of health and substituted another attorney, adjourning the trial for two weeks to enable the newly assigned counsel to prepare. The trial judge was of the opinion, in view of the assur-

ance given by the new attorney's firm that he would be given sufficient assistance, that he could be prepared by April 2nd.

The disposition of a request for continuance rests in the discretion of the trial judge and the exercise of that discretion will not be disturbed unless a clear abuse is shown. See, *e.g.*, *Avery* v. *Alabama*, 308 U. S. 444 (1940); *Johnson* v. *United States*, 291 F. 2d 150 (8th Cir. 1961), cert. denied, 368 U. S. 880 (1961); *Torres* v. *United States*, 270 F. 2d 252 (9th Cir. 1959), cert. denied, 362 U. S. 921 (1960); *Bunn* v. *United States*, 260 F. 2d 313 (8th Cir. 1958); *Thomas* v. *United States*, 252 F. 2d 182 (9th Cir. 1958); *United States* v. *Kelley*, 186 F. 2d 598 (7th Cir.), cert. denied, 341 U. S. 954 (1951); *United States* v. *Wright*, 176 F. 2d 376 (2d Cir. 1949), cert. denied, 338 U. S. 950 (1950). The test here is whether the lack of effective assistance of counsel was such "as to shock the conscience of the Court and to make the proceedings a farce and mockery of justice." *United States* v. *Wright*, *supra*, at 379; *Avery* v. *Alabama*, *supra*, at 450. And the "time consumed in oral discussion and legal research is not the crucial test. * * * The proof of the efficiency * * * lies in the character of the resultant proceedings." *United States* v. *Wright*, *supra*, at 379.

We find no abuse of discretion here. We have already referred to the difficulties experienced in bringing this case to trial a second time. The defendants and the government had grave interests at stake in seeing that further procrastination be avoided and that the trial be commenced without delay. The trial court was authorized, indeed was required, to take whatever reasonable steps he could to effectuate those ends. His action, in set-

ting the case peremptorily against both sides and directing that the trial begin on April 2nd, was such a reasonable step. The contention that it was an abuse of discretion is belied by the zeal and quality of the performance rendered by defense counsel at trial and before this court.

1. *The Panicos and Loicano*

Carmine and Salvatore Panico and Angelo Loicano contend that they were deprived of adequate and effective counsel and were denied their constitutional right to be represented by counsel of their own choosing. On September 5, 1961, Albert C. Aronne, Esq., filed notices of appearance for both Panicos. Mr. Aronne was not present at the first pretrial conference held on March 9th but did appear for the second conference on March 12th. He there moved to withdraw his appearance asserting that it was never intended that he would try the case because the Panicos did not want him as trial counsel; that he was not familiar with the procedure in the federal courts and that he had not been paid. The trial court denied the motion on the ground that it came too late. In the afternoon of March 29th, three days before trial, Mr. Aronne informed the trial court that he had been ordered to trial in a state court and would be detained there for about a week. On October 23, 1961, Sylvester Cosentino, Esq., filed a notice of appearance on behalf of Loicano. In the first morning of trial, Mr. Cosentino did not appear and it was found that he was in the hospital.

Thus, on the first day of trial, there were three defendants who did not have counsel in court. In an attempt to

proceed with the trial, the judge requested that other counsel cover for the missing attorneys until they returned and that the defendants agree to such coverage. Neither request met with any success, the Panicos now deriving comfort only from Mr. Aronne's representation.

Defense counsel on this first morning were also in the process of substituting counsel for a number of defendants. When all the switches had been made, George Todaro, Esq., ended up relieved of his representation of other clients. The trial court assigned him to represent the two Panicos and Loicano until such time as their retained counsel returned or they obtained other counsel.[11] Later, the court directed the prosecution not to put in evidence directly relating to these defendants until their retained counsel returned. Accordingly, the testimony through April 11th dealt primarily with the substantive counts and did not directly involve the Panicos or Loicano. Mr. Aronne returned on April 11th and the Judge afforded him an opportunity to review the existing trial record and make any motions on behalf of the Panicos, or recall any witnesses for further cross-examination. He also offered Mr. Aronne the opportunity to make an opening address on behalf of the Panicos after the Government rested, despite their explicit waiver of an opening. Mr. Cosentino returned on April 16th and the same opportunities were made available to him. From April 11th, when testimony concerning Loicano began, to April 16th, Mr. Todaro was representing only Loicano.

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11 This appointment was challenged in a mandamus proceeding before this court. The writ was denied. *Loicano* v. *MacMahon*, 2d Cir. Docket No. 27487, April 4, 1962.

These three appellants claim that the trial judge, by proceeding with the trial while their retained counsel were absent and by appointing Mr. Todaro to represent all three on an interim basis, deprived them of the effective assistance of counsel and the right to counsel of their own choice.

A defendant in a federal court is, of course, entitled under the Sixth Amendment to the assistance of counsel for his defense, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and where he is able to obtain counsel for himself he must be given a reasonable time and a fair opportunity to secure counsel of his own choosing. *Crooker* v. *Chandler*, 357 U. S. 433 (1958); *Chandler* v. *Fretag*, 348 U. S. 3 (1954). An accused's right to select his own counsel, however, cannot be insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. *United States* v. *Terranova*, 309 F. 2d 365 (2d Cir. 1962); *United States* v. *Arlen*, 252 F. 2d 491 (2d Cir. 1958); *United States* v. *Paccione*, 224 F. 2d 801 (2d Cir.), cert. denied, 350 U. S. 896 (1955); *United States* v. *Mitchell*, 138 F. 2d 831 (2d Cir. 1943), cert. denied, 321 U. S. 794 (1944). Thus, if a defendant does not give the court adequate notice that his retained counsel will be unable to attend the trial, the trial court may, in the exercise of its sound discretion, do what is reasonably necessary to meet the situation. And where the inability of retained counsel to serve gives promise of unreasonable delay or inconvenience in completing the trial, the court may require the defendant to secure other counsel. *Releford* v. *United States*, 288 F. 2d 298 (9th

Cir. 1961); *Lee* v. *United States*, 235 F. 2d 219 (D. C. Cir. 1956); *Smith* v. *United States*, 288 Fed. 259 (D. C. Cir. 1923).

We find that the judge acted reasonably in the circumstances. The delay that would have been caused by acceding to the Panicos' vacillating desire to have Mr. Aronne represent them at trial, and Loicano's insistence on Mr. Cosentino's services despite the knowledge of his heart condition and the fact that this condition had caused repeated motions for adjournments in the first trial is precisely the kind of obstruction which the right to counsel of one's own choice must not be allowed to produce. These appellants refused to obtain other counsel and rejected the court's attempt to obtain coverage from the other defense counsel. They demanded that the court close its doors until they and their counsel were ready for trial. One with a bent for statistics would find, no doubt, that if this trial were continued on every occasion that one or more of the defendants or their counsel so requested the trial would still be in progress. This disruption of the court's business and tampering with the rights of the other defendants and the government cannot be tolerated. See, *United States* v. *Mitchell*, *supra*. The steps taken by the court during retained counsel's absence and the opportunities made available to them on their return fully protected the rights of these appellants.

These three appellants, relying on *Glasser* v. *United States*, 315 U. S. 60 (1942), also contend that the appointment of Mr. Todaro to represent all three denied them the effective assistance of counsel. This claim is baseless.

As the Supreme Court recognized in *Glasser*, and as the circuits have recognized since that case was decided, an appellant must show some conflict of interest between himself and the other defendants represented by his attorney before he can claim successfully that the joint representation deprived him of his right to counsel. See *Wynn* v. *United States*, 275 F. 2d 648 (D. C. Cir. 1960); *Lebron* v. *United States*, 229 F. 2d 16 (D. C. Cir. 1955), cert. denied, 351 U. S. 974 (1956); *Lott* v. *United States*, 218 F. 2d 675 (5th Cir. 1955); *Sanders* v. *United States*, 183 F. 2d 748 (4th Cir. 1950), cert. denied, 340 U. S. 921 (1951); *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), aff'd 341 U. S. 494, rehearing denied, 342 U. S. 842 (1951); *Kennedy* v. *Sanford*, 166 F. 2d 568 (5th Cir.), cert. denied, 333 U. S. 864 (1948); *Setser* v. *Welch*, 159 F. 2d 703 (4th Cir.), cert. denied, 331 U. S. 840 (1947); *Farris* v. *Hunter*, 144 F. 2d 63 (10th Cir. 1944). As noted above, Mr. Todaro represented these three appellants during a part of the trial in which no significant evidence was introduced against any of them. In compliance with the court's instructions, the prosecution put in evidence relating only to the substantive counts in which none of them were named. No conflict of interest is pointed to by appellants and none is apparent to us.

2. *Galante*

On September 5, 1961, Nicholas P. Iannuzzi, Esq., filed a notice of appearance for Galante. On the first afternoon of trial he sought to withdraw in favor of Miss Frances Kalm, who told the court that she had been retained some

three weeks earlier but had not had the opportunity to so advise the court. The trial judge permitted Miss Kahn to appear as co-counsel and conduct the defense but explicitly refused to relieve Mr. Iannuzzi of his representation. On June 12, Miss Kahn suffered one of the injuries that plagued defense counsel during the trial of the case. No proceedings were held on this day and the court summoned Mr. Iannuzzi to appear. Galante was afforded an opportunity to obtain other counsel if he so desired. During the remainder of the week, Galante refused Mr. Iannuzzi's assistance. On June 18th Mr. Iannuzzi turned himself into the hospital. Doctors appointed by the court to determine the physical conditions of Miss Kahn and Mr. Iannuzzi could find no objective symptoms of injury or illness. The court called in Kenneth O'Connor, Esq., to whom Galante had spoken the previous week about representing him and assigned him to represent Galante. Galante objected to this assignment, objected to representing himself, and failed to get other counsel. Galante's claim that he was denied the effective assistance of counsel of his own choice is sufficiently answered by what we said in relation to the similar claims of the Panicos and Loicano. The happenings below demonstrate quite forcefully why the courts have had occasion to say that the right to counsel cannot be manipulated so as to interfere with the fair administration of justice. The trial court's conclusion that manipulation was afoot is not so devoid of basis as to require reversal.

3. *Mirra*

Mirra contends that he was denied the right to act as his own counsel by the trial court's denial of his request to

discharge his defense counsel and conduct the cross-examination of the chief government witness, Smith, himself. Mirra had been represented with great skill throughout the trial by appointed counsel. Mirra indicated no dissatisfaction with his counsel and apparently relied solely on his right to represent himself. One charged with crime has an absolute right to do without an attorney and conduct his own defense (28 U. S. C. § 1654), but that is quite different from the right to discharge counsel after trial has begun. This latter right is a qualified one. *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 940 (2d Cir.), cert. denied, 360 U. S. 937 (1959); *United States* v. *Dennis*, *supra*; *United States* v. *Mitchell*, 138 F. 2d 831 (2d Cir. 1943), cert. denied, 321 U. S. 794 (1944); *United States* v. *Gutterman*, 147 F. 2d 540 (2d Cir. 1945). The contention of Mirra is much like the claim that was raised in *United States* v. *Dennis*, *supra*. We there said:

> "If the judge feared that the result would be, as he said, another of those 'outbursts' which he had found it so hard to deal with, it appears to us that he was within his powers to confine Davis to the exceptionally capable protection of Mr. Sacher. To deprive a judge of that much control over such an issue would play into the hands of any accused who might seize the opportunity still further to confuse a trial already much confounded." 183 F. 2d at 234.

The record discloses that Mirra had excellent representation by counsel who took advantage of every opportunity by motion, examination and cross-examination to protect his interests.

D. *The Charge*

Appellants contend that the court "failed at any point in his charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy", and thereby committed the plain and reversible error we condemned in *United States* v. *Massiah*, 307 F. 2d 62, 70 (2d Cir. 1962). We hold that the charge was sufficient.

At the beginning of the charge on conspiracy, the trial court had the first four paragraphs of the conspiracy count of the indictment read to the jury. These paragraphs, after enumerating the defendants and conspirators, specifically stated the purpose of the criminal enterprise —to unlawfully import narcotics into the United States, and to deal in narcotics knowing them to have been illegally imported. Immediately thereafter, the court, in substance repeated what had just been read, by explaining that the defendants were charged with conspiring to violate Sections 173 and 174 of Title 21 U. S. C., and by reading the pertinent portions of the statutes.

There is thus an important difference at the outset between the charge in the present case and that given in *Massiah*. In *Massiah*, the trial court read the appropriate portions of 21 U. S. C. § 173 and § 174 to the jury, but he also read the conspiracy section of the Criminal Code, 18 U. S. C. § 371, and expressly instructed the jury that it was the violation of this provision that was charged in the indictment. The indictment was not read to the jury at all. The many references in the remainder of the court's instructions as to the conspiracy "charged in the indictment" simply compounded the error.

In the present case, the court, at the very outset of the conspiracy charge, read both the indictment and the statutes, 21 U. S. C. §§ 173, 174 under which the defendants were being tried. He did not read the general conspiracy statute, 18 U. S. C. § 371. It must thus have been clear to the jury from the outset that the defendants were charged with conspiring to import narcotics or to deal in them, knowing of their illegal importation. Each reference thereafter to the conspiracy "as charged in the indictment", rather than compounding the error re-emphasized the need for such a finding, and directed the attention of the jurors to the appropriate language in the copy of the indictment that they had with them during their deliberations.

After reading the statutes and the indictment, the court continued:

> "There are only three elements of the crime of conspiracy:
>
> (1) The existence of the conspiracy *as charged in the indictment;*
>
> (2) That a defendant knowingly and with wilful intent associated himself with the conspiracy; and
>
> (3) The commission by any conspirator of at least one of the overt acts set forth in the indictment." (Emphasis supplied.)

Then, in discussing the first element, he charged:

> "The first element is satisfied if, from proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged co-conspirators met in an understanding

way so as to bring about an agreement to illegally import and distribute narcotics as charged."

Appellants urge that this language rendered the charge even more erroneous than that in *Massiah* because the jurors were thus "affirmatively told that they could find all the appellants guilty on count eight if but two of the conspirators knew about the illegal importation." On the contrary, this sentence, read in context,[12] permitted the jurors to convict only as to those defendants who knew of the illegal importation, and thus saved the charge from error. Very shortly following this sentence, the court further charged:

> "You may find that the conspiracy existed even if you find that one or more of the persons charged were not members. It is sufficient if any two or more persons have conspired. *You may find those defendants guilty who joined the conspiracy with knowledge of its purpose and acquit those who did not join.*" (Emphasis supplied.)

It was thus made clear that as few as two may be conspirators, but that each must know of the illegal importation. The first passage quoted defined conspiracy, the second, its members.

Later, in dealing with the distinction between single and multiple conspiracies, the court reiterated this analysis:

> "Such a conspiracy, [single] may be shown to exist, you will recall, if two or more of the defendants or co-conspirators in some way or manner came to

12 See *United States* v. *Agnesi*, *supra* at 825; *Carey* v. *United States*, 296 F. 2d 422, 426 (D. C. Cir. 1961).

a mutual understanding to accomplish the broad objectives set out in the indictment. Whether or not each defendant joined this conspiracy is another matter which I shall come to in a moment."

Finally, the judge concluded his instructions as to the existence of the conspiracy, and began his charge on its membership as follows:

"If, after considering all the evidence, you decide that the government has failed to prove, beyond a reasonable doubt, the existence of one overall conspiracy *to import and deal in narcotics illegally as charged*, you must acquit all the defendants on count 8.

"On the other hand, if you are satisfied, beyond a reasonable doubt, that the government has proved one overall conspiracy to import and deal in narcotics illegally as charged, *the second element which you must next decide, as to each defendant separately, is whether the government has proved, beyond a reasonable doubt, that he knowingly and intentionally joined or became a member of the conspiracy with knowledge of its unlawful purpose.*

"The mere fact, however, that a defendant may be present at meetings or associated with members of the conspiracy is not in itself enough to make him a conspirator unless you first find that he intentionally joined a conspiracy *with knowledge of its purpose.*

"Those who come in later, *with knowledge of the aims and purposes of the conspiracy*, and cooperate in a common effort to attain the unlawful results,

become parties to the conspiracy. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One may become a member of the conspiracy without full knowledge of all of the details of the conspiracy. One defendant may know only one other member of the conspiracy, yet, *if he knowingly cooperates to further the object of the conspiracy*, with knowledge that others have combined to violate the law, he becomes a member although his role may be only a subordinate one." (Emphasis supplied.)[13]

Defense counsel did not except to these portions of the charge. Certainly the lack of further emphasis on this element did not amount to that "plain error" necessary to warrant reversal in the absence of exception taken below. See Fed. R. Crim. P. 30, 52(b). There is no "plain error" unless the "charge may have resulted in a miscarriage of justice or in the denial to appellant[s] of a fair trial." *Herzog* v. *United States*, 235 F. 2d 664 (9th Cir. in banc), cert. denied, 352 U. S. 844 (1956). That is not the case here.[14]

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13 This sentence was held in the context of the *Massiah* charge to have compounded the error therein. In the context of the entire charge in the present case, it was clearly correct. See *United States* v. *Agueci*, *supra*, at 825; *United States* v. *Aviles*, *supra*, at 188.

14 Several appellants contend that in marshalling the evidence the trial court erred in failing to mention certain details favorable to them. We shall deal with several specific allegations of error at a later point. Reviewing the charge as a whole, we find that the trial judge carefully and specifically summarized the evidence favorable to the defendants, as well as that favorable to the government, in a manner well designed to insure separate considera-

E. *Limitations on Cross-Examination of Smith*

Appellants complain that they were unduly restricted in their cross-examination of the witness Smith. We find no merit in the contention. The trial court permitted extensive and repetitious examination of Smith as to any matters bearing on his credibility, his bias toward the defendants, and his motive for testifying. In addition, the defense had an abundance of material from which to examine Smith, including but not limited to, a statement produced under the Jencks Act, extensive grand jury minutes, Smith's testimony in the first trial, his testimony in an unrelated proceeding in Illinois, and his testimony before

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14 (Continued.)

tion by the jury of the evidence for and against each individual defendant. In exercising his broad discretion in marshalling the evidence, the trial judge was not required to comment on every tidbit of evidence in the lengthy trial that each litigant considered most favorable to him. *Allis* v. *United States*, 155 U. S. 117, 124 (1894). Moreover, the judge carefully instructed the jury that it must consider *all* the evidence, that he could not review the evidence in its entirety, that his reference to certain evidence and not to other evidence did not indicate that he considered that which he mentioned more important, and that in any event, it was the jury's recollection that controlled.

The appellants further contend that the trial judge committed reversible error by taking from the jury the factual issue of whether the witness Smith was an accomplice in the conspiracy, and in effect instructed them that Smith was an accomplice as a matter of law. Appellants misread the charge. In the passage complained of, the trial court correctly restated Smith's testimony that "by his own admission [he was] an accomplice" to the crime charged. He then cautioned the jury that in light of this admission, it must scrutinize Smith's testimony with special care. This instruction framed in almost identical language, was approved by this court in *United States* v. *Agueci*, *supra*, at 833.

an Inquiry Officer of the Immigration and Naturalization Service in 1958. Defense counsel were allowed great latitude in utilizing these materials and were permitted to inquire into many matters of a remote nature. See, *e.g.*, *United States* v. *Aviles*, *supra*.

F. *Cadieux Testimony*

Several defendants raise objections to the reading to the jury of the testimony given by Suzanne Cadieux at the first trial. She had there testified that in December of 1958 she had seen the defendant DiPietro make a payment of $47,000 to Pepe Cotroni for the delivery of a package of narcotics and that in February of 1959 she saw Galante meet with the Cotroni brothers, Stepanoff, Robert and an American attorney to arrange for the delivery of $5,500 worth of heroin to that attorney. She also testified as to the incident in which she was threatened by the defendant Mirra after Cotroni's arrest.

On January 9, 1962, Mlle. Cadieux executed an affidavit in Canada, disclosed by the Government early in the retrial, recanting her prior testimony in its entirety and stating that it was all a lie induced by her desire to help René Robert then incarcerated in Canada. Her affidavit also contained implications of subornation of her perjury on the part of the Assistant United States Attorney.

At the second trial, the Government moved for permission to read her testimony given at the first trial to the jury on the grounds that she was unavailable as a witness. A *voir dire* on this motion disclosed that the Government's efforts to contact her after her recantation had met with no

success, although defense counsel encountered no such difficulties. The Court properly held that she refused to come to the United States as a witness without any complicity on the Government's part, apparently out of fear that she would subject herself to a perjury charge here if she were to testify at the second trial. The trial judge, however, was also of the view that her prior testimony should not be admitted without some disclosure of the exculpatory matter, and permitted defense counsel to take her deposition in Canada as if it were cross-examination. The Court's finding of her unavailability is buttressed by her refusal to be deposed at the United States Consulate in Montreal, necessitating transfer of proceedings to the Sheraton Mount Royal Hotel. Both her prior testimony and her deposition were read to the jury.

We find no error in this manner of proceeding. Unavailability having been fairly established, her prior testimony was admissible. *Mattox* v. *United States*, 156 U. S. 237 (1895), 5 Wigmore, Evidence § 1404 (3d ed. 1940). See also *West* v. *Louisiana*, 194 U. S. 258 (1904). Allowing the deposition to be taken without subjecting the witness to the perjury sanctions available if she had testified here may have given the defendants even greater latitude than they were entitled to. *United States* v. *Sobleu*, 203 F. Supp. 542, 568 (S. D. N. Y. (1961), aff'd 301 F. 2d 236 (2d Cir.), cert. denied, 370 U. S. 944 (1962). There is no merit to the contention that Cadieux's recantation made her prior testimony totally inadmissible. The subsequent extra-judicial statement was merely impeaching material on the credibility of her prior testimony and it was for the jury to decide which, if either, statement was to be believed.

Due to the charges levelled in the Cadieux affidavit at the Assistant United States Attorney, he was permitted to take the stand to testify that at the time Cadieux testified at the first trial, he believed she was telling the truth. The Judge instructed the jury that he was allowing this testimony because if the Assistant believed that Cadieux was lying when he put her on the stand, the jury should acquit the defendants. This testimony was not offered to enhance the credibility of Cadieux' first trial testimony but rather to rebut serious accusations against the Government officer trying the case which, if left unanswered, might have seriously prejudiced the Government. The defense having introduced such material, the Government was clearly entitled to answer it. Cf. *United States v. Graham*, 102 F. 2d 436, 441-443 (2d Cir. 1939). Perhaps the questioning might have been more artfully framed so as to avoid any appearance of the witness's vouching for Cadieux's credibility, but we find no reversible error here. *Lawn v. United States*, 355 U. S. 339, 359 n. 15 (1958).

II

A. *Salvatore Panico*

Salvatore Panico urges that because the trial judge precluded him from testifying in his own behalf, his conviction be reversed.

After several earlier hints, one of the two attorneys representing the Panico brothers informed the court toward the end of the trial that despite counsel's advice to the contrary, Salvatore desired to testify in his own behalf.

Counsel were in a somewhat embarrassing position in this regard, having represented to the trial court and to this court in an attempt to mandamus a second psychiatric examination of their client, that they could not communicate with him. Since neither attorney desired to call him, the court directed them to confer with him and his brother again and to advise the court of their decision. Subsequent to this conference, during which Salvatore refused to speak with his attorneys, Carmine Panico, his brother, informed the court that Salvatore still desired to take the stand. The court then called Salvatore before him and informed him that he could testify only to facts. He responded that he only wanted to tell "the truth". The court then continued:

> "The Court: But let me tell you now that you cannot take that stand and make any outburst against anybody else.
>
> "Defendant Salvatore Panico: No, I am just going to say the truth, that's all.
>
> "The Court: Are you going to behave as a gentleman on that stand?
>
> "Defendant Salvatore Panico: I am going to say the truth, that's all.
>
> "The Court: Are you going to behave as a gentleman?
>
> "Defendant Salvatore Panico: What do you mean?
>
> "The Court: Behave yourself up here.
>
> "Defendant Salvatore Panico: I am going to say the truth up there. That's what you want. That's what the whole world wants is the truth.
>
> "The Court: You have a right to take the stand."

The court then further advised Panico of his right to remain silent, that he must behave himself on the stand, and that he would be "very severely" punished for contempt if he did not. Finally, the court ordered a fifteen-minute recess and ordered counsel to "prepare him to go on the stand." During the recess, the court overruled an objection by counsel for Ormento to Salvatore's taking the stand, and conferred with his attorneys and with Carmine Panico regarding the questions to be asked. The court warned the marshals to be alert, and ruled that Salvatore would testify from his place in the courtroom, rather than from the witness stand, so that he would be easier to handle in case of a second jury attack or other misconduct.

After dealing with another matter, the court asked counsel whether they could represent to him what Salvatore would testify to. Counsel answered that since he refused to speak to them, they could not say. Thereupon the court ruled:

> "I had him up there before me and he wouldn't answer. When I asked him whether he would behave, he kept shouting he is going to tell the truth.
>
> "I hold, under the circumstances, that he has waived his right to take the stand in his own defense. By his failure to cooperate for psychiatric examination and because of his conduct the risk of prejudicing the other defendants is overwhelming. He has done that time and time again and done so wilfully and deliberately. For those reasons I hold that he voluntarily waived his right to take the witness stand in his own defense."

At common law, the accused was not competent to give sworn testimony in his own behalf in a criminal proceeding.

It was thought that competency would be more harmful than helpful to the accused, since the jury might infer guilt if he then failed to take the stand, while cross-examination might place him in a situation where even an innocent man might appear at a disadvantage if he did testify. And it was believed that due to his overwhelming interest in the outcome, testimony of the accused would not and could not be believed. See 2 Wigmore, Evidence § 579 (3d ed. 1940). The right of the accused to be present and to make his defense was jealously guarded, however:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor v. McVeigh, 93 U. S. (3 Otto) 274, 277 (1876).

Toward the end of the last century, the fallacy of the view denying the competence of the accused to testify came to be generally recognized. A federal statute removing the disability was enacted in 1878, 30 Stat. 20, and is contained today without substantial change in 18 U. S. C. § 3481.[15]

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15 "§ 3481. Competency of accused.

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833."

Similar provisions have been enacted in all states except Georgia. See *Ferguson* v. *Georgia*, 365 U. S. 570 (1961).

This statutory "privilege" to testify in one's own behalf has come to be recognized as having an importance similar to the right to be present at one's trial and to present a defense. Thus in *Wilson* v. *United States*, 149 U. S. 60 (1893), the court, after referring to the common law rule, said:

> "This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt, which he would readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case. In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established." *Id.* at 65-66.

The privilege has been described as one of "inestimable value." *Yates* v. *United States*, 227 F. 2d 844, 846, (9th Cir. 1955). The statute renders the accused competent "provided *only* that he testifies at his own request." *Heitler* v. *United States*, 244 Fed. 140, 141 (7th Cir. 1917) (emphasis supplied). See also *Brown* v. *United States*, 56 F. 2d 997 (9th Cir. 1932); *Wolfson* v. *United States*, 101 Fed. 430 (5th Cir. 1900). It has been held by at least one state court that denial of the privilege deprives the accused of a fair trial. *People* v. *Rakiec*, 260 App. Div. 452, 23 N. Y. S. 2d 606 (1940), aff'd 289 N. Y. 306, 405 N. E. 2d 812 (1942). See also *People* v. *Rosenzweig*, 135 Misc. 324, 239 N. Y. S. 358 (Sp. Sess. 1929).

Appendix A—Opinion of the Court of Appeals

In view of the importance of the privilege, we cannot say that Salvatore Panico waived his privilege to testify in his own behalf. The question appears to be one of first impression, and while we do not wish to indicate that the privilege may never be waived by conduct, the facts in the present case do not warrant that conclusion. Panico's outbursts and serious misconduct earlier in the trial would have warranted a warning that violence on his part or the hurling of obscenities at the objects of his dislike might result in a curtailment of the privilege of testifying. However, that Panico, when testifying, might have attempted to incriminate all the other defendants and to exonerate himself, was to be expected. He might well have desired to testify for this very purpose but this purpose, even if announced in advance, presents no reason for court or counsel for other defendants to preclude him from so doing. He had a right to say in effect, "I never trafficked in narcotics; such narcotics as I saw were in the possession of defendants A, B and C." Whether the jury would have believed him is immaterial; he should have had the opportunity to present his version of the facts. The trial judge is, of course, under a heavy duty to maintain the order and decorum necessary for a fair trial. By permitting Panico to testify, the court might have risked further outbursts. But upon any sign of misconduct, the marshals could quickly have subdued him, and replaced his gag for the remainder of the trial if necessary. The judgment of conviction of Salvatore Panico must be reversed.

B. *Carmine Panico*

Appellant Carmine Panico urges that the error for which we reverse the conviction of his brother Salvatore requires reversal of Carmine's conviction as well. We do not agree.

The questions raised by Carmine's appeal in no way involve the right of a defendant to testify in his own behalf. Rather, the question relates to the discretion of the trial court to preclude counsel for a criminal defendant from calling a certain witness other than the defendant himself. At the outset, it should be noted that counsel did not attempt to call Salvatore as a witness for Carmine and so he may not complain that the witness was not heard.

Even if Carmine's failure to call Salvatore as his witness may be excused because of the obvious futility of such an attempt, there is no error, that warrants reversal of Carmine's conviction. Carmine had already testified in his own defense when Salvatore sought to testify. No tender of proof having been made, we may assume that he, if permitted to testify, would have corroborated his brother's story and his testimony would thus have been cumulative. While such corroborative testimony may be of considerable importance, its admission in evidence rests in the sound discretion of the trial court, Fed. R. Crim. P. 26; 6 Wigmore, Evidence §§ 1907, 1908 (3d ed. 1940). Under the facts presented, where the corroborating witness sought to be called has made numerous outbursts and engaged in physical misconduct, the trial judge might have concluded, in the exercise of discretion, that Salvatore Panico would

not confine himself to proper testimony in behalf of Carmine, and in view of the risk of prejudice to the other defendants, have precluded Carmine from calling him as a witness.[16]

C. Galante

Galante contends that the trial judge abused his discretion in limiting the number of alibi witnesses that he could call in his behalf. Smith had testified to seeing Galante in New York on two separate occasions sometime in June, 1958. The alibi offered was that Galante was in Florida during this period and thus could not have been seen by Smith at the time testified to. Three witnesses testified to this effect on behalf of Galante. The trial judge then ruled that only two more witnesses would be allowed to testify to Galante's presence in Florida on the ground that such testimony was cumulative. The court later revised this ruling to allow Mr. O'Connor, who was then representing Galante, to put on all of his alibi witnesses. Mr. O'Connor could not produce any more witnesses but was allowed to read the prior trial testimony of two of these witnesses to the jury. The judge's offer to permit him to read to the jury the prior testimony of another witness was declined.

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16 Appellant Galante claims error in that if Salvatore Panico had been permitted to testify, Galante could have shown on cross-examination that Panico's outburst placing Galante at the Appalachin meeting was false. This allegation is totally without merit. All that we have said with regard to Carmine's contention applies with equal force here. Moreover, Salvatore's outburst was not testimony, and he could not properly have been cross-examined regarding its truth or falsity.

Galante's claim here is difficult to understand inasmuch as the trial court gave him the opportunity to call as many alibi witnesses as he desired and, when they were not available, allowed their prior testimony to be read to the jury. If the first ruling was error, and we intimate no such view, it was certainly cured by the later ruling.

Galante also contends that wiretaps made in violation of § 605 of the Federal Communications Act furnished the basis for the testimony of witness Cadieux and for the indictment. Judge Level, on the first trial, held an extensive *voir dire* on wiretap problems and concluded that "there has been no indication whatsoever that information obtained from taps has * * * led directly or indirectly, to the discovery of any of the evidence which the government has utilized in the prosecution of the case." Judge Level was correct. See *United States* v. *Agueci*, *supra*. The wiretaps in question occurred some nine months after Smith began to cooperate with the Government and six months after he had introduced Agent Biase into the conspiracy. The inferences appellant would have this court draw are without foundation in the record.

D. *Mirra*

Appellant Mirra raises several claims of error apart from those already discussed as to all defendants. His first contention is that the indictment should have been dismissed on the grounds of double jeopardy, alleging that he had been convicted of the same offense in *United States* v. *Stromberg*, Cr. 154-86, S. D. N. Y. 1958, aff'd. 268 F. 2d 256 (2d Cir. 1959), cert. denied, 361 U. S. 863 (1959). His

motion to dismiss on these grounds was denied by Judge MacMahon, who adopted the earlier opinion of Judge Levet at the first trial, Opinion #26832 (S. D. N. Y.). We agree with Judge Levet's conclusion that "The Stromberg and Bentvena conspiracies constitute in fact and law distinct and separate ventures." See *United States* v. *Perrone*, 161 F. Supp. 252 (S. D. N. Y. 1958). Comparison of the two cases demonstrates disparate factual contexts. Anthony Mirra was the only defendant common to both prosecutions, the overt acts delineated in *Stromberg* took place between 1951 and 1955 while those in *Bentvena* took place in 1958 and 1959; the source of the narcotics in *Stromberg* was France; in *Bentvena* it was Canada. Neither proof of the facts alleged in the *Bentvena* indictment nor the proof actually submitted would have been sufficient to convict Mirra of participation in the conspiracy charged in *Stromberg*. See *Ferracane* v. *United States*, 29 F. 2d 691 (7th Cir. 1928); *United States* v. *Claus*, 19 F. Supp. 435 (E. D. N. Y. 1937).

Mirra also claims as error the disclosure by the Government to the jury of his prior narcotics conviction in *Stromberg*, *supra*. In the *Bentvena* trial, Mirra took the stand in his own defense and testified that he had been convicted of a crime in 1958. When asked on direct examination if he had ever had anything to do with narcotics, he answered "No". On cross-examination the Government was permitted, over defense objection, to ask Mirra what the 1958 conviction was for, and to introduce into evidence the record of his prior conviction. Although such evidence might, in the discretion of the trial judge, have been excluded if offered for general impeachment purposes, the

defendant, having asserted on direct that he never had any connection with narcotics, opened the door to proof impeaching this specific testimony. Cf. *United States* v. *Colletti*, 245 F. 2d 781 (2d Cir.), cert. denied, 355 U. S. 874 (1957); *United States* v. *Nelson*, 273 F. 2d 459 (7th Cir. 1960). The trial judge properly instructed the jury that this evidence could be used only for impeachment purposes and not to prove Mirra's guilt.

In addition, Mirra argues that he was improperly denied certain surveillance reports by officials of the New York State Parole Board and the New York City Police Department covering the period of May and June, 1958, during which Smith and Mirra had allegedly been engaged in various narcotics transactions. The surveillance had been initiated to secure evidence of possible parole violations by the severed defendant David Petillo, and were later turned over to the State Liquor Authority which was investigating Mirra's alleged undisclosed interest in Chickie James' Stable and LaComedie. The trial judge orginalfy denied the reports on the ground that they were privileged, and finally after examining them *in camera*, declined in his discretion to make them available and ordered them sealed.

Passing questions of whether they were privileged information and whether there was sufficient evidentiary basis for their production, see *United States* v. *Iozia*, 13 F. R. D. 335 (S. D. N. Y. 1952), having inspected these reports, we find no prejudice to the defendant by virtue of their non-disclosure. The direct testimony by Smith on this phase of the case is not specific as to dates, but described events only as having occurred early or late in May and

June. The surveillance was directed primarily at the activities of Petillo, and was in no way comprehensive enough in coverage either as to time or area to be of any value to Mirra for impeachment purposes. Furthermore, to the extent that the reports place Mirra, Smith, Fernandez and Petillo in frequent company at Johnny's Keyboard and at Chickie James' Stable, they tend more to corroborate than to impeach the testimony of Smith.

Mirra finally contends that the court improperly denied his motion to suppress evidence allegedly obtained by illegal wiretaps. His claim is that the surveillance already discussed was the result of wiretaps by state authorities during the period from February to October, 1958. Judge Levet found on the first trial, after conducting an extensive *voir dire*, that there was no indication that information obtained from the taps was transmitted to federal agents. The only federal participation alleged by Mirra is the fact that narcotics agent Rowan was shown the contents of the reports which he used when he subsequently questioned Smith in January, 1960. As Smith had already become an undercover employee of the Narcotics Bureau well before his contact with Rowan, these state wiretaps did not bear any relationship to the evidence secured by the federal government against Mirra.

E. *Mancino*

Appellant Mancino also asserts several claims of prejudicial error at the trial. At the time of the negotiations by Smith and Biase to set up a new outlet for narcotics supplied by Cotroni, Cotroni indicated that objections to this

new outlet were being raised by some of his New York people, one of whom he indicated to be Mancino. Cotroni also stated that at one time he had considered Mancino to be a "good man", but that Mancino was on his way down, and the only reason Mancino was good was that he knew all the right people. Mancino contends that these statements were hearsay declarations outside his presence, and were inadmissible because in furtherance of a separate conspiracy in direct conflict with the one charged in the indictment. It is quite true that Cotroni indicated to Smith and Biase that they would be taking $150,000 to $200,000 worth of business from some of these other people, but even if so, a new outlet would be a transfer rather than a conflict with the old conspiracy. A conspiracy, once established, is presumed to continue until the contrary is demonstrated and, as we said earlier, a conspiracy of this kind by its very nature is constantly expanding. There is no indication that Cotroni had any intention of totally severing his supply lines to his other outlets in New York City, including Mancino. While certain of Cotroni's remarks, such as statements to the effect that Mancino used to be a good man, might be considered as inadmissible because purely narrative in character, see *United States v. Goodman*, 129 F. 2d 1009 (2d Cir. 1942), others clearly were not, see *United States v. Tarricone*, 242 F. 2d 555 (2d Cir. 1957), and any error in admitting the purely narrative declarations was harmless in view of the overwhelming evidence of Mancino's participation. Fed. R. Crim. P. 52(a).

Appendix A—Opinion of the Court of Appeals

Mancino complains of the refusal by the trial judge to permit the admission of the first trial testimony of Mrs. Susini, the wife of a Parisian attorney. Smith had testified that at the Montreal meeting in April or May of 1957 which Mancino had attended, he met "Pepe" Cotroni as he was leaving the meeting. Cotroni's wife testified that her husband left for Paris in March, 1957, and she did not see him again until May 12, 1957, in Paris. Mrs. Susini had testified at the first trial to seeing Cotroni in Paris on May 5, 1957, and frequently thereafter during the remainer of the month. On a *voir dire*, the defense sought to establish that Mrs. Susini was unavailable on the second trial, thus justifying the use of her prior testimony. Having failed to do so by competent testimony, Mancino's attorney requested permission to take her affidavit in Paris through his Paris office. The Judge denied this request in his discretion on the grounds that it was both collateral and cumulative testimony. We agree that this was merely collateral impeaching material which it was within the Judge's discretion to reject. See McCormick, Evidence § 47 (1954).

In addition, Mancino claims that the Government on summation misquoted the record in belittling an alleged inconsistency, pointing out in defense counsel's closing, between Smith's testimony at the two trials. Mancino argues that the Judge's refusal to correct this misstatement constituted reversible error. Counsel attempts to denominate this inconsistency as "vital", but it is only one of many minor inconsistencies in Smith's testimony brought to the attention of the jury by the defense.

F. *Sciremammano*

Sciremammano contends that the indictment should have been quashed as to him because Smith made no mention in his Grand Jury testimony of Sciremammano by name. However, Smith did testify that he gave narcotics at the Squeez-Inn Bar to someone named Sal who had a club foot. This was sufficient identification of this defendant. As the Supreme Court in *Costello* v. *United States*, 350 U. S. 359, 363 (1956) stated:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. * * * " An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

G. *Bentvena, Monastersky and Struzzieri*

The facts developed with respect to the purchase and delivery of heroin which involve Bentvena, Struzzieri and Monastersky constitute the proof which formed the basis of the prosecution's case against them as charged in counts 4 and 5. On January 5, 1959, Agent Giorgio of the Bureau of Narcotics met appellant Monastersky on East 116th Street in Manhattan and on the following day ordered one-half kilogram of heroin from him for $6,000. Monastersky arranged for delivery that evening. During that evening, other agents of the Bureau of Narcotics followed Monastersky and saw him enter 525 East 88th Street.

Several minutes later, a car driven by the defendant Marcantonio Orlandino entered the block. Struzzieri alighted from it and entered the same building carrying a package covered with blue and white Christmas wrapping paper. After some time he emerged empty-handed and drove off with Orlandino. Shortly thereafter Monastersky came out and drove out of the area. Later, the agents observed the co-conspirator, McGovern, come out of the building carrying a package of similar size and wrapping and followed him to 448 East 87th Street.

Later that evening, Agent Giorgio met Monastersky and was told by him that his partner had the "stuff". Monastersky took him to an apartment at 448 East 87th Street and introduced him to McGovern, who threw a package wrapped in blue and white Christmas wrapping paper on the table. Giorgio tested the contents and told Monastersky that it was "junk". The three men left the apartment and went downstairs where Giorgio handed McGovern $6,000 and McGovern gave the agent the narcotics. Another agent saw McGovern and Monastersky return to 525 East 88th Street where they met Struzzieri and Orlandino. Struzzieri and Orlandino left and were later overheard discussing Agent Giorgio's unwillingness to part with the money in advance of receiving the narcotics.

On January 13, 1959, Giorgio ordered more narcotics, agreeing to meet Monastersky that evening. They met and proceeded to 525 East 88th Street where they were told to return in an hour, Monastersky explaining to the agent that the "junk" wasn't there yet. Approximately 50 minutes later, Bentvena and Struzzieri entered the building. Gior-

gio returned, accompanied by Agent Mangiaracina, who was introduced to Monastersky by Giorgio as his partner. While Mangiaracina waited in the lobby at 525 East 88th Street, Monastersky and Giorgio went to a second-floor apartment, passing Struzzieri and Bentvena on the way in. Giorgio, on being told by McGovern that these two were the delivery boys, asked McGovern to tell them not to become apprehensive of Mangiaracina, who was in the lobby, as he was Giorgio's partner. McGovern went to the house-phone, spoke into it, and returned saying the junk would be there in a few minutes. Struzzieri and Bentvena walked to a car parked on 88th Street, opened the trunk, and removed a package which Bentvena tucked under his arm. Both men returned to McGovern's apartment, walking past Mangiaracina who was still in the lobby, and delivered the package to McGovern. The sale to Giorgio was then consummated.

In subsequent conversations between McGovern and Giorgio, McGovern discussed his overhead—$200 to Monastersky and $50 to the delivery boys. When, after numerous conversations between Giorgio, Monastersky and McGovern, agreement on the terms of future transactions could not be reached, negotiations were discontinued.

The evidence allegedly connecting Monastersky, Bentvena, and Struzzieri to the conspiracy consisted of (1) a glassine bag filled with narcotics seized from Marcantonio Orlandino evidencing a puncture sealed with an "X" in Scotch tape, (2) Orlandino's phone book containing a phone number alleged to be Tuminaro's, and (3) the hearsay remarks of Cotroni to Smith to the effect that the narcotics seized from Orlandino had belonged to "Bootsie" and

"Angie" (Fuminaro and DePasqua) and had been supplied by Cotroni and that the "X" Scotch tape covering of the puncture was his trademark.

Although it is clear that the hearsay declarations of a conspirator are admissible against his co-conspirators if made pursuant to and in furtherance of the conspiracy, *Clune* v. *United States*, 159 U. S. 590, 593 (1895); *Fiswick* v. *United States*, 344 U. S. 604, 617-18 (1953), it is equally clear that there must be independent evidence establishing a defendant's participation in the conspiracy before such declarations are admissible against him. *Glasser* v. *United States*, 315 U. S. 60, 74-75 (1942); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 576 (2d Cir. 1961); *United States* v. *Stromberg*, 268 F. 2d 256, 265-67 (2d Cir. 1959). A defendant's "participation in the conspiracy which the Government sought to prove can be established only by proof, properly admitted into evidence, of their own words and deeds." *United States* v. *Russano*, 257 F. 2d 712, 713 (2d Cir. 1959). Such independent proof must be substantial and not "too slight." *United States* v. *Consolidated Laundries Corp.*, *Supra*; *United States* v. *Stromberg*, *supra*.

The Government's independent proof of participation fails to meet this standard and is tenuous at best. For the first time on appeal, the Government places primary reliance on the so-called Cotroni trademark found on the narcotics seized from Orlandino. Assuming *arguendo* that a Cotroni trademark was sufficiently established, nevertheless, that finding would have to be bottomed solely on the hearsay remarks of Cotroni. No independent evidence ad-

missible against these defendants establishes the existence of such a trademark. In fact, the sole independent evidence available to connect these defendants with the conspiracy is the presence of the phone number, alleged to be Tuminaro's, in Orlandino's phone book. To find this to be of significance would be tantamount to holding that the mere association of conspirators is sufficient basis for a finding of participation. This notion we have already explicitly rejected. *United States* v. *Stromberg*, *supra*, at 267. The Cotroni hearsay thus being inadmissible against them, the Government failed to prove these defendants' participation in the overall conspiracy, and their conspiracy convictions must be reversed. My colleagues, however, believe that the joinder of the substantive and conspiracy counts against Bentvena, Monastersky and Struzzieri with the conspiracy count against the other defendants was so prejudicial as to also require reversal of their convictions on substantive counts 4 and 5. Therefore, the balance of this opinion expresses my dissent from the views set forth in the opinion of Judge Smith.

Struzzieri, Monastersky, and Bentvena contend, and the majority agree, that reversal of their substantive convictions is required, first, because they were improperly joined in this indictment, second, because they were tried in this mass conspiracy trial and, third, because evidence, particularly hearsay evidence, was admitted under the conspiracy count and the court failed to adequately instruct the jury that such evidence could not be used to convict under the substantive counts. In my opinion, the decision of the majority adopting these arguments represents a radical departure from the practice heretofore

sanctioned in this circuit and elsewhere and may, in my view, effectively bar any joinder of substantive and conspiracy counts in criminal prosecutions.

Turning to the first contention of appellants—improper joinder, it is settled that failure of the prosecution to present sufficient independent evidence of the participation of these three defendants in the conspiracy charged does not require the conclusion that the indictment was improperly obtained *ab initio* or that the conspiracy and substantive counts were improperly joined. *United States* v. *Schaffer*, 362 U. S. 511 (1959). An indictment merely contains the charges which the prosecution hopes to prove—a platitude dinned into the ears and minds of the jurors throughout the trial. To anyone familiar with the courtroom scene, the cases are legion in which defendants are convicted on some counts, acquitted on others, cleared of conspiracy, convicted on substantive counts, and vice-versa. Witnesses to support the indictment may or may not be available or they may change their stories upon the trial. Alibi witnesses may suddenly appear to refute the Government's witnesses. In other words, the mere fact that the Government fails as to one or more counts does not mean that the indictment was improperly obtained or secured in bad faith. These should be elementary truisms.

The next asserted ground for reversal—that these three appellants were prejudiced by being tried in this mass conspiracy trial, is articulated by the majority as concern over the fact that they were "forced to sit through months of testimony establishing the conspiracy, none of which related to the substantive accusations." Much of what has

just been said as to joinder is applicable here. Since these appellants were properly joined in this indictment, it is difficult to understand why they should not have been tried under it. Determination of whether there was sufficient proof to implicate them in the conspiracy had to await the end of the case. If, at that point, the trial judge, the jury or (later) an appellate court finds that the prosecution has not proved its case on the conspiracy count, the defendants are not, solely because they have been forced to sit through a long trial, entitled to the bonus of acquittal or reversal on the substantive counts which the government has proved.

The critical inquiry here is whether severance was required because of possible prejudice arising from the joinder of these three appellants with the other defendants. *United States* v. *Schaffer, supra.* A realistic approach to this question requires consideration of the nature of the narcotics conspiracy itself and a review of some recent decisions of this Court.

Investigation of a narcotics ring usually has its origin in a sale or series of sales made to narcotics or undercover agents. The salesmen, however, are as a rule on the outer fringe—the lowest echelon in the hierarchy of narcotics rings. Note, in passing, the "delivery boy" status ascribed to Bentvena and Struzzieri who for $25 apiece were in actual possession of a commodity retailing at $6,000 a half kilo. Quite frequently, the ringleaders or overlords of the narcotics business do not stultify themselves by possession when handlers can be so cheaply hired. Therefore, in an effort to bring a modicum of reality into the picture,

the courts in the absence of Congressional action have had to create the doctrine of constructive possession or control. But the Government has learned that the occasional arrests of mere sellers will not seriously impede the drug flow. It is necessary, if possible, to apprehend those who are in charge of importation, wholesaling and retailing. Thus, when one of these major narcotics conspiracies is brought to trial, the number of defendants is usually large and the facts complex.

The character of some of the multi-defendant narcotic trials of importance brought in the federal courts in New York within the last five years illustrates the above quite vividly. In *United States* v. *Strogberg*, *supra*, there were 46 defendants and 16 others charged in a single conspiracy count. Of this number, 19 were tried together. The trial court directed a verdict of acquittal as to one, the jury convicted 18. On appeal, this court examined the record to determine whether there was sufficient independent evidence to sustain the conviction of each defendant. As to three defendants, this court found the evidence too slight to have been submitted to the jury and reversed and remanded with directions to dismiss. The "mass trial" arguments were rejected, the court finding that "nothing in the issues, the evidence or the rulings warrants a conclusion that the number of defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law." 268 F. 2d at 624.

In *United States* v. *Avilles*, *supra*, 37 defendants and 14 co-conspirators were named in the indictment. 17 stood

trial, one was acquitted by the court, one by the jury, and the balance were convicted. Again, this court reviewed the record to determine whether there was sufficient evidence of knowing participation of each defendant in the conspiracy to warrant submission of the case as to him to the jury. As to one defendant, the court held that there was no such evidence and directed dismissal of the indictment as to him. The mass trial argument advanced was rejected and the convictions of 16 defendants were affirmed.

In *United States v. Agueci, supra*, the indictment contained 30 counts, the first count charged conspiracy, the remaining twenty-nine counts charged various defendants with substantive violations. There were 19 named defendants and 8 co-conspirators. 11 were convicted, 10 appealed. Several appellants contended that although the indictment charged one continuing conspiracy, the proof actually revealed several separate and independent conspiracies and that the prejudicial effect thereof required reversal. However, this court held that, even had there been several conspiracies, they could have been consolidated for trial. Furthermore, we said that "the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal." 310 F. 2d at 827.

In each of those cases, some defendants had to sit through a lengthy trial after all the evidence relating to them had been introduced or had to patiently await the evidence that implicated them. This is inherent in the very nature of the case being tried. The courts have long recognized that narcotics conspiracies require a functional

division of labor. A pusher may be the subject of the testimony of a single witness who might be called on the first or last day of trial. So, too, the "executive" has to sit through testimony relating only to minor sales about which he may know nothing. This has never been considered by this court to be so prejudicial as to require severance or reversal by an appellate court when severance was refused. This prejudice, if it be such, would also exist if the jury found the defendants not guilty on the conspiracy count but guilty on substantive counts.

Struzzieri, Monastersky and Bentvena contend, and the majority agree, that evidence, particularly hearsay evidence, was admitted under the conspiracy count and that the court failed to adequately instruct the jury that such evidence could not be used to convict under the substantive counts. Appellants point to Cotroni's statement that the Orlandino "junk" was his; to McGovern's statement that Struzzieri and Bentvena were his delivery boys; and to an entry in a telephone book belonging to Orlandino containing the name "Ang. Tumanaro", an address and a phone number. The validity of these contentions can be resolved only from the charge itself.

The court dealt with each count separately and instructed the jury that each count of the indictment must be considered separately and that the guilt or innocence of each defendant referred to in that count must be determined separately. After Count 4 (Struzzieri and Monastersky) was read in its entirety, the court summarized the evidence to be considered by the jury in deciding whether the defendants charged therein were guilty or innocent. The summary of proof necessary for "The government, to

establish the first essential element against Struzzieri and Monastersky" encompassed primarily the testimony of two narcotics agents concerning the events of January 5 and 6, 1959, including the meeting with Monastersky and McGovern, the order from the Agent to Monastersky for one-half kilo for $6,000, Struzzieri's carrying the package and payment and delivery. The defense testimony was also summarized. Struzzieri, testifying in his own defense, claimed the package contained a shirt, not heroin. Monastersky also testified that the discussions with the agents related to the organization of a crap and blackjack game and that the cash was the amount the agent had available to invest in the game. No reference was made to any of the facts (later summarized by the court in dealing with count 8 and developed largely through the witness Smith who did not testify as to any of the facts involved in the substantive counts) upon which the conspiracy was based or to the "delivery boy" hearsay by McGovern or to the Cotroni, Oriandino hearsay. In short, the evidence controlling guilt or innocence under this substantive count was limited to the events actually observed or clearly admissible conversations.

The court's summary as to Count 5 was also limited to the events of January 13, 1959, and covered the testimony of three agents who described the order to Monastersky for another half kilo at $6,000, the activities of Bentvena, Struzzieri and McGovern, and the delivery of, and payment for, the heroin. Struzzieri, testifying in his own defense, claimed that the package which Bentvena took out of a car contained betting slips, not heroin. No conspiracy proof was mentioned as applying to this count.

Although there was no direct evidence that Monastersky had actual physical possession of the packages involved in the transactions of January 6 and 13, there is ample evidence upon which a conclusion of constructive possession or control can be based. Similarly as to Struzzieri, he may not have physically handled the package on January 13, 1959, but the proof was sufficient to warrant a finding of constructive possession or control.

The court's instructions to the jury properly defined the elements entering into constructive possession and control, and related them to the actual proof presented. The court adverted to no testimony as to events subsequent to the middle of January, 1959, or which were developed as part of the proof introduced to establish the conspiracy.

In contrast to the evidence summarized as to the specific sales of January 6th and 13th, 1959 (the substantive counts), the court's treatment of the conspiracy count was entirely different. After count 8 had been read, the court separately reviewed the conspiracy testimony, commencing with the Montreal meeting in April or May, 1957, attended by many of the defendants and including the various importations from Canada to New York and the distribution of the heroin to the several outlets in New York and Brooklyn. Only to connect Monastersky, Struzzieri and Bentvena to the conspiracy were the hearsay "delivery boys" and "Cotroni" conversations referred to. Thus, the court was diligent in keeping the many items of proof confined to the counts to which they related.

The fear expressed by these three appellants that the jury, in convicting them on the substantive counts, may have been influenced by proof rendered to establish the

conspiracy count is belied by the jury deliberation itself.

Soon after the jury began its deliberations, they requested that the testimony regarding the Bentvena-Struzzieri-Monastersky sales of narcotics be read, along with the instructions on these substantive counts. Also requested were all the exhibits on the first substantive count, count 4, and an index of all exhibits received in evidence. The jury was brought in and asked to be more specific on the first three of these requests. A few minutes later the jury returned a note specifying those parts of Agent Giorgio's testimony regarding the January 6, 1959, transaction that were desired. Shortly after this testimony was read, the exhibits on count 5 were requested. Further requests by the jury related only to the conspiracy count. It seems clear that the jury, during its five days of deliberation, considered each count separately and, in considering the substantive counts, used only the evidence that had been marshalled by the judge in his charge on the substantive counts. As noted above, none of the hearsay declarations were included in this summary.

Despite the instructions given, the careful marshaling of the evidence, and the jury deliberations, the majority "cannot feel confident" that the hearsay declarations did not contribute to the convictions on the substantive counts. Again, I must voice my view that this is simply unrealistic. The error which causes reversal of the conspiracy convictions of these three appellants was the failure to connect them to the conspiracy except through evidence we now hold to have been inadmissible. But this evidence did not relate to the substantive counts in any manner whatsoever. This my colleagues virtually concede in saying, "The week

of proof at the beginning of the trial relating to these three was practically the only reference to them. Thereafter, the trial was solely concerned with proof of guilt in the conspiracy." From this they conclude that "no prejudice to the other defendants resulted from their trial with the three substantive-count defendants", the reason given being that "It is unlikely that this would confuse jury deliberations." However, if the jury were not confused by the separate conspiracy phase, why would it have been prejudicially confused by the equally separate substantive phase.

If the possibility of confusion is to be our concern, it would be well to consider the confusion that will now surround prosecutors and trial judges as a result of the majority decision. Consider some of the possibilities inherent in the usual multi-defendant narcotics trial. Somewhere amongst the defendants will be one or more who, the prosecutor charges, have actually made sales of narcotics and who are also part of the conspiracy. If the jury acquits them on the conspiracy count but convicts on the substantive count, how can any appellate court "feel confident" that hearsay evidence received solely on the conspiracy count might not have been a prejudicial factor in the conviction on the substantive count. The same situation is presented if tainted evidence is received on the substantive counts and the jury brings in a verdict of guilt only on the conspiracy count. The same will be true if only substantive counts are charged and evidence is erroneously admitted as to one count on which the jury finds the defendant not guilty. There can be no logical distinction drawn between these situations and the situation before us where an appellate court, instead of a trial judge or a jury, finds that conviction on one count, as to which tainted

evidence was received, was not warranted. Upon appellate review how can we ever "feel confident" that a jury in convicting did not rely upon some answer given before objection taken and subsequently stricken or upon something said by court or counsel despite instructions to ignore such remarks. Any argument to the effect that such a possibility is less likely when the jury brings in a verdict of not guilty on the unproven count because the jury probably discredited such evidence or because such evidence was not related to the other counts is pure speculation. The jury may have fully credited such evidence but found that guilt was not proved beyond a reasonable doubt.

If a feeling of confidence is to be our standard, we should forbid the joinder of counts in one indictment. Appellate courts have never found this course necessary, however, because they have followed the rule that testimony related to counts on which there was an acquittal is not harmful even if it was improperly admitted at trial. Thus, courts have consistently held that if there was sufficient evidence to support conviction on one count, errors relating to other counts will not be reviewed if the sentences are to run concurrently. See *e.g. Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *Sinclair* v. *United States*, 279 U. S. 263, 299 (1929); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Pinkerton* v. *United States*, 328 U. S. 640 (1946); *United States* v. *Mont*, 306 F. 2d 412 (2d Cir. 1962); *Blassingame* v. *United States*, 254 F. 2d 309 (9th Cir. 1958); *Thomas* v. *United States*, 211 F. 2d 45 (D. C. Cir.), cert. denied, 347 U. S. 969 (1954); *Miranda* v. *United States*, 196 F. 2d 408 (9th Cir.) cert. denied, 344 U. S. 842 (1952); *Gibson* v. *United States*, 149 F. 2d 381 (D. C. Cir., cert.

denied, 326 U. S. 724 (1945). And this has been the practice even when an appellant contended that there was insufficient evidence to convict him on a conspiracy count if the court found that his substantive conviction was warranted by the record. *See United States* v. *Agueci*, *supra*; *United States* v. *Cardillo*, 2d Cir. April 24, 1963.

I feel that in cases where the conspiracy count is dismissed at the close of the prosecution's case by the trial judge, or where the jury returns a verdict of not guilty on the conspiracy count, or where an appellate court reverses a conviction on the conspiracy count, we should follow the standards applied by Judge Medina in *United States* v. *Schaffer*, 266 F. 2d 435 (2d Cir.), aff'd, 362 U. S. 511 (1959). There it was found that no prejudice existed, first, because instructions were given on every offer of proof that evidence admitted with respect to one defendant was not to be considered with respect to any other defendant. Second, the witnesses were called in orderly fashion so that each group of witnesses focused on a separate defendant. Third, the court's charge carefully reviewed the evidence pro and con with respect to each defendant, and an admonition was given to keep the charges separate and to consider the evidence against each defendant separately. Each of these safeguards against adverse prejudice is satisfied here. In addition, the court charged the jury in the exact language approved by the Supreme Court in *Blumenthal* v. *United States*, 332 U. S. 539, 559-60 (1947), namely, that "the guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone." Thus,

in view of the more than adequate evidence of guilt on the substantive counts, I would affirm those convictions.

The other appellants also seek to take advantage of this joinder, claiming prejudice by being tried with the Orlandino phase defendants. This effort must fail, however, because all of the evidence introduced at trial was properly admissible against these appellants. There was sufficient independent evidence to link these appellants to Cotroni as members of the same conspiracy. The Cotroni statements to Smith and Biase concerning Orlandino were thus binding on these appellants and were sufficient to make the Orlandino phase defendants their co-conspirators in one over-all conspiracy. The fact that there was sufficient independent evidence to make the Cotroni statements binding on the Orlandino phase defendants does not change this result. The situation presented is that the Government proved the existence of one overall conspiracy but failed to present sufficient independent evidence to make the Cotroni statements admissible against Bentvena, Monastersky and Struzzieri. Since they were their co-conspirators, the other appellants cannot claim error in the introduction of evidence relating to the Orlandino phase defendants, or prejudice in being tried with them.

We wish to express our special thanks and gratitude to Constantine N. Katsoris, Esq., and William R. Luney, Esq., who acted as assigned counsel, both at trial and on appeal, and to Richard V. Giordano, Esq., who acted as assigned counsel on appeal. The trial of this case was long and arduous and preparation of the appeal required the reading of the 25,000-page record of both trials. The devotion and skill demonstrated by these attorneys casts credit

upon them. Their briefs and oral arguments conformed to the highest standards of the profession.

The convictions of Bentvena, Monastersky and Struzzieri on the substantive and conspiracy counts are reversed, and the substantive counts are remanded for a new trial; the conviction of Salvatore Panico on the conspiracy count is reversed and remanded for a new trial; the convictions of all other appellants are affirmed.

SMITH, *Circuit Judge*, with whom HAYS, *Circuit Judge*, joins, concurring in part:

Judge Hays and I agree with the careful and exhaustive opinion of our brother Moore except in one respect, the affirmance of the convictions on the substantive counts, 4 and 5.

The trial of Bentvena, Struzzieri and Monastersky together with those indicted and tried only for conspiracy under the circumstances here portrayed, we feel, constituted prejudicial error as to them. The proof of their participation in the transactions alleged in the substantive counts was presented at the start of the government's case. Thereafter, they and the jury were forced to sit through months of testimony establishing the conspiracy, none of which related to the substantive accusations. We cannot feel confident that the admission of this evidence against them, when it was legally inadmissible unless they were shown to be part of the conspiracy, did not contribute to their convictions on the substantive counts by blackening them with

the general guilt. See *Schaffer* v. *United States*, 362 U. S. 519, 523 (1960) (dissenting opinion).

This is not a case like *Schaffer* v. *United States*, *supra*, or *United States* v. *Manfredi*, 275 F. 2d 588 (2 Cir. 1960), in which the dismissal of a conspiracy count as to less than all defendants during trial was held not to prevent submission to the jury of substantive counts against these defendants. (It may be noted that even in *Schaffer* four judges dissented.) Proper cautionary instructions there can presumably limit the prejudicial effect of the evidence presented at the trial directed towards proof of the conspiracy. Indeed, one might speculate that a jury would scrutinize evidence of substantive guilt with greater than ordinary care once apprised of the fact that the government had failed to prove its conspiracy case against a particular defendant. But in the case at bar there were no limiting instructions to disregard evidence concerning these defendants. All counts were submitted to the jury, which found defendants guilty of conspiracy on evidence that we have unanimously held to be legally insufficient, and then considered the mass of hearsay declarations of purported co-conspirators against them. There appears to us far greater likelihood of prejudice here than in a case where the jury has weighted the evidence of conspiracy and found it wanting; or where the Court has so found and warned the jury to disregard it.

Particular evidence of prejudice can readily be found. Struzzieri and Monastersky both took the stand and denied dealing in narcotics. Though admitting their physical presence in the area and certain details as to their physical movements, they claimed that their activities and those of

Bentvena related to gambling transactions. Struzzieri's testimony to fourteen or fifteen bookmaking arrests (supported by police testimony) lends a certain wry corroboration to his story. Both Bentvena and Struzzieri were brothers-in-law of the severed defendant McGovern, who figured prominently in the alleged substantive violations. The package wrapped in Christmas paper was said to be a present to him. From these and other details, the three sought to explain the activities in which they were observed on some basis other than dealing in narcotics. We may be skeptical, but it is not our primary function to appraise this evidence. The jury charged with that duty could hardly have given their defense the same consideration after they were erroneously found to be narcotics conspirators as it would have had they been tried on the substantive counts alone. The mass of conspiracy evidence militated against their credibility and towards their guilt.

Nor do we overlook the general prejudice that results to unrelated defendants who are tried in a mass conspiracy trial. We need but quote *Kotteakos v. United States*, 328 U. S. 750, 772-73 (1946):

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition, and call for the use

of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift towards totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

However, we find that no prejudice to the other defendants resulted from their trial with the three substantive-count defendants. The week of proof at the beginning of the trial relating to these three was practically the only reference to them. Thereafter, the trial was solely concerned with proof of guilt in the conspiracy. It is unlikely that this would confuse jury deliberations. Moreover, all of the direct evidence of their participation in the conspiracy was properly admitted against the conspiracy defendants. These appellants attack so-called "real evidence" (narcotics and paraphernalia) which was admitted—particularly that allegedly purchased from the three which they claim to be inadmissible against the conspiracy defendants on the record before us. Once they were linked to the conspiracy by independent evidence this

appears properly admissible against them. Moreover, this was of itself of no particular force to prove participation in the conspiracy by any individual. It was merely duplicative of other like evidence seized from co-conspirators which was properly admitted. Even if there were error in the admission of any of this evidence we could not hold it prejudicial.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and sixty-three:

Present:

HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM BENTVENA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of

said District Court of appellants Bentvena, Monastersky and Struzzieri as to the substantive and conspiracy counts be and they hereby are reversed, and that the action as to said appellants be and it hereby is remanded for a new trial as to the substantive counts in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgment of conviction of appellant Salvatore Panico on the conspiracy count be and it hereby is reversed and that the action be and it hereby is remanded for a new trial in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgments of conviction of all other appellants be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk